United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

163-700

THE PRESS PUBLISHING COMPANY,

Plaintiff in Error,

vs.

ALEXANDER McDONALD,

Defendant in Error

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the Southern District of New York.

THE LAW ASSOCIATION OF PHILADELPHIA.

PRINTED UNDER THE DIRECTION OF THE CLERK.

Transcripts

V

Record

1895

992

143 U.S.

700-701

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United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Alexander McDonald, plaintiff, and The Press Publishing Company, defendant, a manifest error hath happened, to the great damage of the 2
said The Press Publishing Company, as is said and appears by their complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 12th day of October, 1895, that the 3
record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done herein to correct the error what of right and according to the law and custom of the United States ought to be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of September, in the year of our Lord one thousand eight

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Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of September, in the year of our Lord one thousand eight

hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS.
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

[SEAL.]

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 181, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The Press Publishing Company, plaintiff in error, against Alexander McDonald, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this Ninth day of October, in the year of our Lord one thousand eight hundred and ninety five, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

(Endorsed)—Take notice, that the within is a copy of a writ of error, duly filed this day in the within entitled action, in the Office of the Clerk of the U. S. Circuit Court for the Southern District of New York.—Dated Sept. 16, 1895.—Bowers & Sands, Attorneys for Plff. in error, 54 William St., N. Y. City.—To Deming & Walradt, Esqs., Attorneys for Deft. in error.

United States Circuit Court of Appeals, Southern District of New York.—The Press Publishing Company, Plaintiff in Error, against Alexander McDonald, Defendant in Error.—Writ of Error.—Bowers & Sands, Attorneys for Plaintiff in Error, 54 William Street, New York.—Service of the within is admitted this 16th day of Sept., 1895, Deming & Walradt, Attorneys for Defendant in Error.—U. S. Circuit Court.—Filed Sep. 16, 1895.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER McDONALD,
Plaintiff,

AGAINST

THE PRESS PUBLISHING COMPANY,
Defendant.

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, this 29th day of October, in the year one thousand eight hundred and ninety-two.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

DEMING & WALRADT,
Plaintiff's Attorneys,
Office and Post Office address,
58 William Street,
New York City.

10 U. S. CIRCUIT COURT

FOR SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER MCDONALD, Plaintiff, AGAINST THE PRESS PUBLISHING COMPANY, Defendant.	Complaint.

11

The plaintiff, Alexander McDonald, by Deming & Walradt, his attorneys, complains of the defendant, The Press Publishing Company, and respectfully shows to this Court:

FIRST.—On information and belief, that at the times of the events hereinafter mentioned, the defendant was, and it now is, a corporation created by and existing under the laws of the State of New York, and has its principal office and place of business in the city and county of New York; that at said times, and previous thereto, the defendant was the publisher and proprietor of, and was engaged in
19 printing and publishing at the City of New York, the daily newspaper known as *The World*, which newspaper at the said times had a large circulation in the city and State of New York and elsewhere within and without the United States.

SECOND.—That the plaintiff is a citizen of the State of Ohio, and resides and has for many years last past resided in the city of Cincinnati in said State, that he is well known in said city of Cincinnati, and is well known throughout the State of Ohio; that plaintiff has a very large acquaintance in the city and State of New York and elsewhere

within and without the United States; that at the time of the publication hereafter mentioned, plaintiff held many positions of trust and confidence, and was connected in an official capacity with many corporations and associations, among others the following: President of the Standard Oil Company of Kentucky, doing business among other places in southern Ohio; president of the Consolidated Coal and Mining Company of Cincinnati, Ohio; vice-president of the Cincinnati Art Museum Association; president of the Commercial Club of Cincinnati; director of the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company; director of the Cincinnati, New Orleans and Texas Pacific Railroad Company; director of the Addison Steel and Pipe Works of Cincinnati, Ohio; director of the Third National Bank of Cincinnati; director of the Comet Coal Company of Dayton, Ohio; that in all the said positions, and in other similar ones, plaintiff's reputation for honesty and uprightness was of vital importance, and until the commission of the grievances hereinafter mentioned, plaintiff was always reputed and esteemed to be a good and worthy citizen of good name, fame and credit.

THIRD.—That on the 18th day of August, 1892, the defendant, being the printer and publisher of the said newspaper, *The World*, as aforesaid, did in said newspaper, issued and circulated that day, falsely, wickedly and maliciously publish and cause and procure to be *published of and concerning this plaintiff* the false, scandalous and defamatory article, words or matter as follows:

"MISSING MILLIONAIRE MCDONALD LOCATED."

"CINCINNATI, O., Aug. 17.—McDonald, (meaning "this plaintiff) Southern Ohio Manager of the Stand-"ard Oil Company until six months ago, when he "(meaning plaintiff), strangely disappeared, has "been located living in luxury at Bellmore, near "Windsor, Canada."

16 Thereby meaning and intending to accuse the plaintiff of the crime of embezzlement, or of being accessory thereto, and meaning and intending to be understood and believed that the plaintiff had been guilty of the crime of embezzlement, or that plaintiff was accessory to such crime, and guilty as such, and meaning and intending to accuse the plaintiff of, and to have it understood and believed that he was guilty of a great and infamous crime, and meaning and intending to accuse the plaintiff of odious and disgraceful conduct, and thereby to injure and destroy his character and bring him into disrepute and disgrace, and meaning and intending that plaintiff was there-
17 fore obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains.

FOURTH.—That said article or matter aforesaid in so far as it charged or insinuated that this plaintiff had been or was guilty of any crime, is utterly false and defamatory and that all such statements and insinuations therein contained to that effect that he had been guilty of odious, disreputable or disgraceful acts or conduct, are in like manner false and defamatory; that plaintiff was never guilty of any of the criminal, infamous or disgraceful acts which are stated or insinuated in the said article or
18 matter. That plaintiff has never strangely disappeared; that he was never obliged and never did run away secretly to Canada or anywhere else to escape the penalty of any laws or for any other reason or purpose; that he has never lived at or near Bellmore, near Windsor, Canada; that he has never visited said Bellmore, and that he has never owned any property there or near there.

FIFTH.—That by reason of the printing and the publishing of the article or matter aforesaid, the plaintiff has been injured in his good name and reputation and brought into public scandal, infamy and

disgrace, to his damage in the sum of fifty thousand ($50,000) dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of fifty thousand ($50,000) dollars, with interest thereon, from the 18th day of August, 1892, besides the costs of this action.

DEMING & WALRADT,
Plaintiff's Attorneys,
58 William Street,
New York City,
N. Y.

STATE OF OHIO, }
Hamilton County, } ss.:

ALEXANDER MCDONALD, the plaintiff above named, being duly sworn, says: That he has read and knows the contents of the foregoing complaint; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ALEXANDER MCDONALD.

Sworn to before me this twenty-fifth day of October, 1892.

[SEAL.] JAS. E. JENNINGS,
Notary Public.

(Endorsed)—United States Circuit Court, for the Southern District of New York.—Alexander McDonald, Plaintiff, against the Press Publishing Company, Defendant.—Summons and Complaint.—Deming & Walradt, Attorneys for plaintiff, 58 William Street, New York.—I hereby certify that on the 2d day of November, 1892, at the City of New York, in my District, I personally served the within Summons upon the within named defendant The Press Publishing Company by exhibiting to J. Augus Shaw, Treasurer of said Company, the within original and at the same time leaving with him a copy thereof. And at the same time & place I delivered to & left with him a copy of the complaint in this action. J. W. Jacobus, United States Marshal, Southern District of New York.—Dated November 3d, 1892.—Filed Dec. 19, 1893.

22 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER McDONALD,
Plaintiff,

AGAINST

THE PRESS PUBLISHING COMPANY,
Defendant.

Answer.

23

The Press Publishing Company, the defendant above named, answering the complaint of Alexander McDonald, the plaintiff above named, respectfully shows to this Court by Platt & Bowers, its attorneys, and alleges:

For a first defense to the alleged cause of action in said complaint contained:

FIRST.—The defendant denies each and every allegation in said complaint contained.

24 And further answering and by way of a second, separate and partial defense to the alleged cause of action in said complaint contained and in mitigation of any damages to which the plaintiff might otherwise seem entitled:

FIRST.—The defendant repeats and re-alleges the denial hereinbefore stated as fully and with the same force and effect as if here particularly set forth and further alleges, on information and belief, that prior to the eighteenth day of August, 1892, to wit, on or about the seventeenth day of August, 1892, there was published in the *Cincinnati Evening*

Post, a newspaper published and circulating in the City of Cincinnati, in the State of Ohio, the following article or matter, to wit.: 25

"IN CANADA.

"EVAN SMITH, OF THE STANDARD OIL COMPANY,

"Is Located by Alex. McDonald, His Brother-in-law.

"Evan Smith, who for many years was the confidential man and bookkeeper of the Consolidated Tank Line Company and the Standard Oil Company in Cincinnati, disappeared very suddenly last April.

"Smith is the brother-in-law of Alexander McDonald, the millionaire, who controls enough of the stock of both companies to keep him as the Southern Ohio head of the two concerns. 26

"Expert bookkeepers were put at work after night investigating his accounts. They found everything straight, and this fact baffled further efforts, until about ten days ago.

"Then, through the police agencies, Smith was located, and it was found he was living a luxurious life with plenty of money at Bellmore, a little town some 25 miles east of Windsor, Canada.

"The word was sent to arrest Smith and bring him home. He is expected here Thursday night. Mr. McDonald will not communicate why Smith is so suddenly called back. 27

"He is very reticent and says that his arrest and return does not concern any one except the immediate relatives.

"Everyone at the general office of the Standard Oil Company stoutly maintains that there is no crookedness in Smith's accounts.

"Mr. McDonald would not say whether there was a shortage or whether there were some outside transactions that led to Smith's peculiar actions. The whole affair seems clouded in mystery so far.

"From another source it was learned that the in-

28 tention is to place Smith in a sanitarium upon his arrival in Cincinnati, as it is said he has lost almost his reason, and while living in such an out of the way place, imagined he was poor at times, and then again would spend money lavishly."

SECOND.—The defendant further alleges that in or about the month of August, 1892, it employed in said city a competent and trustworthy agent or correspondent to collect items of interest and general news and forward the same to it by telegraph or otherwise, relating to the said City of Cincinnati and that vicinity. That on said seventeenth day of August, 1892, said correspondent filed to be for-
29 warded to the defendant the following special telegraphic message or dispatch over the wires of the Postal Telegraph Cable Company, to wit: "Cincinnati, O., *The World*, New York. Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio manager of the Standard Oil Company, until six months ago when he strangely disappeared has been located living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a sanitarium here."

THIRD.—The defendant further alleges that in or-
30 der to facilitate its business and to promote celerity and correctness of its news, it had entered into an arrangement with the Postal Telegraph Cable Company, by virtue of which said company had caused to be placed telegraphic loops and circuits from its main office in the City of New York to the office of the defendant in the Pullitzer Building in said city, and messages to the defendant were not received at the office of said telegraph company, but were received directly at the office of the defendant. That said telegraph company maintained its employees at the office of defendant as aforesaid, who there re-

ceived telegraphic messages sent to the defendant 31
from various parts of the country, and delivered the same to the defendant.

FOURTH.—The defendant further alleges that said telegraphic message or dispatch was received at the office of the defendant, and on information and belief avers that the agent of said telegraph company who received said message and delivered the same to the defendant, undertook to transcribe the same upon a typewriting machine, and in so doing either reduced and garbled the message so that it was received by the defendant in the form as alleged to have been published, or the electric circuit by which said telegraphic message or dispatch was trans- 32
mitted was defective and the wire was temporarily grounded, so that a part of the message was not received by the operator at the New York end of the wire.

FIFTH.—The defendant further alleges on information and belief that prior to the said seventeenth day of August, 1892, one Evan Smith was engaged in business in said City of Cincinnati and held a responsible position with the Standard Oil Company, with which corporation the plaintiff herein was then connected; that prior to said last mentioned date said Smith's health broke down and his mind gave way so that he became insane; that thereupon said 33
Smith suddenly disappeared and left said city, and his relatives and friends and employer were ignorant of his whereabouts; that diligent efforts were made to find said Smith, but without avail; that the strange disappearance was a matter of importance to the people of said city, and many rumors were in circulation there as to the reasons of his disappearance; that prior to said seventeenth day of August, 1892, said Smith was located living in luxury at Bellmore, a town near Windsor, Canada; that said Smith had an insane delusion that he was very wealthy.

34 SIXTH.—The defendant further alleges that the matters and facts set forth in the preceding subdivision hereof were known to the defendant and its agents prior to the said alleged publication, and that the same were published in good faith; in the public interest; without any malice whatsoever, whether express or implied, toward either the plaintiff or any other person; with the honest and worthy purpose of serving the public and supplying proper items of news and current interest, and for no other purpose; and further, in the belief on the part of the defendant and its agents and servants, and with probable cause therefor, that the same was true.

35 SEVENTH.—The defendant further alleges that it now employs and did employ in the month of August, 1892, skilled and competent editors, correspondents, reporters, news collectors and other agents and servants to its great cost and expense. That it received said telegraphic dispatch through trustworthy and competent persons employed by it to collect news and items of interest to the public, and was published exactly in the form in which it was received. That the same was transmitted to the defendant and was received in the regular course of business, and was based upon proper information in the hands of the defendant and
36 its authorized agents and servants, upon whose integrity, skill and care the defendant is forced by the nature of its business to rely, and upon whom it does rely.

Wherefore, the defendant demands judgment against the plaintiff dismissing his complaint, with costs in this behalf most wrongfully sustained.

PLATT & BOWERS,
Defendant's Attorneys,
54 William Street,
New York City.

(Endorsed)—United States Circuit Court for the Southern District of N. Y.—Alexander McDonald, Plaintiff, against The Press Publishing Company, Defendant.—Answer and Notice of Filing.—Platt & Bowers, Attorneys for Defendant, 54 William Street, New York.—Take notice that the within is a copy of an answer duly filed this day in the within entitled action, in the Office of the Clerk of the U. S. Circuit Court.—Dated N. Y., 5 June, 1893.—Deming & Walradt, Attorneys for Plff.—Platt & Bowers, Attys. for deft., 54 William St., N. Y. City.—Received June 5, 1893, Deming & Walradt. 37

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Monday the Twenty-seventh day of May, in the year of our Lord, one thousand eight hundred and ninety-five. 38

Present.—The Honorable WILLIAM J. WALLACE,
Circuit Judge.

ALEXANDER MCDONALD
vs.
THE PRESS PUBLISHING CO. 39

Now comes the plaintiff by Horace E. Deming, his attorney, and moves the trial of this cause.

Likewise comes the defendant by John M. Bowers, its attorney.

40 Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties, the argument of counsel, and the charge of the Court, the jury retire on the 28th day of May, 1895, and upon their return, say that they find a verdict for the plaintiff for seven thousand dollars ($7,000) and so they say all.

On motion of Mr. Bowers, a stay of sixty days granted within which to make a case.

(An extract from the minutes.)

JOHN A. SHIELDS,
[SEAL.] Clerk.

41

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER McDONALD,
Plaintiff,

AGAINST

42 THE PRESS PUBLISHING COMPANY,
Defendant.

The issues in this action having been brought on for trial before the Hon. William J. Wallace, Judge, and a jury, at a stated Term of this Court, held at the United States Court Rooms, in the City of New York, on the 27th day of May, 1895, and the defend-

ant appearing by counsel, and the issues having been 43
tried, and a verdict for the plaintiff having been duly rendered on the 28th day of May, 1895, for the sum of seven thousand dollars; and the costs of the said plaintiff having been duly adjusted at $83\frac{85}{100}$ and interest on said verdict having been computed at the sum of one hundred and five dollars,

Now, on motion of Deming & Walradt, attorneys, for said plaintiff, it is

Adjudged that Alexander McDonald, the plaintiff do recover of the Press Publishing Company, the defendant, the sum of seven thousand dollars and interest found by the jury with $\$83\frac{85}{100}$ costs, amounting in all to $\$7,188\frac{85}{100}$, and that plaintiff have execution therefor. 44

Judgment signed and entered this 12th day of September, 1895.

GILBERT E. ROGERS,
Deputy Clerk.

(Endorsed)—U. S. Circuit Court.—Southern District of New York.—Alexander McDonald, Plaintiff, against Press Publishing Company, Defendant—Judgment Roll.—Deming & Walradt, Attorneys for Plaintiff, 11 William Street, New York.—U. S. Circuit Court.—Filed Sep. 12, 1895, 12.45 P. M.—John A. Shields, Clerk.

45

MCDONALD

v.

PRESS PUBLISHING COMPANY.

WALLACE, *C. J.*—I cannot find any safe grounds for disturbing the verdict of the jury in this case, although the amount is so large as to engender con-

46 siderable doubt whether it ought not to be deemed excessive.

The motion for a new trial is denied.

(Endorsed)—McDonald *vs.* Press Publishing Co.—Mem.—Wallace, *C. J.*—U. S. Circuit Court.—Filed Jun. 28, 1895.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

47

ALEXANDER McDONALD,
Plaintiff,

AGAINST

THE PRESS PUBLISHING COMPANY,
Defendant.

At Law.

Bill of Exceptions.

48

APPEARANCES:

DEMING & WALRADT, HORACE E. DEMING, for Plaintiff.

BOWERS & SANDS, JOHN M. BOWERS, for Defendant.

Be it remembered, that afterwards, to wit: At a Circuit Court of the United States, held at the Court Rooms at the United States Post Office Building, in the City of New York, before Hon. William J. Wallace, Judge of the United States Circuit Court for

the Southern District of New York, appointed to 49
hold said Circuit Court on the twenty-seventh day of May, A. D. 1895, the aforesaid issues so joined between the parties as aforesaid, came on to be tried by a jury for that purpose duly impanelled, at which day came there as well the said plaintiff as the said defendant by their respective attorneys, and the jurors of the jury aforesaid for that purpose duly impanelled to try said issues being called also came and were then and there in due manner chosen and sworn to try the said issues.

During the course of the trial the said counsel for the defendant did take and allege sundry exceptions to the rulings, charges and instructions of the Court and to the refusal of the Court to give certain in- 50
structions and directions to the jury, as there and then prayed for by it, which exceptions are hereinafter severally set forth, together with the substance of all material evidence given to support the plaintiff's case.

The following exceptions were taken during the empanelling of the jury:

The defendant having exhausted its peremptory challenge, the following exceptions were taken to the admission of a juror:

ALONZO B. JONES, called as a juror, was examined by defendant's counsel as follows: 51

Q. What is your business? A. Architect.

Q. Do you know the plaintiff in this action, Mr. McDonald, or his counsel, M. Deming? A. I know Mr. Deming slightly.

Q. Have you any business relations with Mr. Deming? A. No, not at all.

Q. Has he ever done any business for you? A. No.

Q. Never has done any business in your office? A. No.

Q. Do you know any of these gentlemen whose

52 names I have read as Standard Oil trustees? A. Yes, sir.

Q. Do you know Mr. Rockefeller? A. I know Mr. Rockefeller.

Q. Do you know Mr. Wardwell? A. No.

Q. Mr. Flagler? A. Yes.

Q. Mr. Archbold? A. No.

Q. Mr. Rogers? A. No.

Q. Mr. Pratt? A. One of them.

Q. Have you had any business with these gentlemen? A. None at all.

Q. Did you ever have any business with the Standard Oil Company? A. No.

Q. Do you read the *World?* A. Occasionally.

53 Q. Have you any feeling or prejudice against the *World?* A. No.

Q. Has there ever been any publication made in the *World* which produced any prejudice in your mind? A. Yes, a great many.

Q. More so than in other papers in this city? A. No; there are a great many publications in all the papers that I have objection to.

Q. Have these been on political, business or private matters? A. Political, mostly.

Q. Have there ever been publications made in the *World* newspaper which have aroused a feeling in your mind that the paper was not conducted as a paper should be? A. Well, I don't know.

54 Q. If a feeling sufficiently strong has been created in your mind to make you feel in any degree prejudiced against the *World?* A. No, any more than any other paper.

Q. Is there a prejudice in your mind against all papers published in this city? A. No prejudice. There are certain articles published.

Q. I mean have you formed an opinion as to the question of their publishing articles which they ought not to publish; do you think they do that? A. Yes.

Q. That you think generally of the press? A. Generally of the press, particularly libellous articles.

Q. You have rather formed the conclusion that 55
the press in New York is in the habit of publishing libellous articles? A. Yes.

Q. Have you ever had any article published concerning you or your business? A. No.

Q. Or that of a friend of yours, which created a feeling? A. No.

Q. Or general conclusion? A. I have had friends; yes.

Q. Have any of your friends brought suit against the paper? A. No.

Q. There have been publications made about friends which have aroused these feelings? A. Yes.

Q. Have any such publications ever been made in the *World*? A. Not to my recollection. 56

Q. Under those circumstances do you feel that you could give a just and fair consideration to the defense that will be presented to you in this case by the *World* newspaper, published by the Press Publishing Company, as if the defendant was some gentleman whom you held in high esteem? A. I would give it as fair consideration as I would any newspaper on the question of libel.

Q. Is it a fact that any newspaper would not stand as well before you as an individual? A. No.

Q. That is a feeling that it would require some little effort for you to disabuse your mind of, is it not? A. Yes. If the evidence was such I could do so. 57

Q. The first impression would be against them? A. Yes.

Q. And the first impression would be against them on a charge of libel? A. Yes.

Mr. Bowers: I submit a challenge to the favor.

By the Court:

Q. I did not understand you to say that you had any personal feeling or prejudice of any kind against the *World* newspaper? A. No, sir.

58 Q. Or the company which publishes it? A. No, sir.

Q. You have a general impression that the newspapers of this city, and perhaps of the country at large, are not as careful as they should be? A. Yes, sir.

Q. In regard to their publications concerning the private transactions of individuals? A. Yes, sir.

Q. Is your feeling such that in any case against a newspaper you have doubt whether you would be able to render an impartial verdict? A. None at all.

Q. You have no doubt of your ability to consider the case against the *World?* A. None at all.

59 Q. Or the corporation which publishes it—upon its merits, and give it the benefit of the rules of law and the evidence? A. If the evidence was in their favor I would give it in their favor.

The Court: I overrule the challenge.

By Defendant's Counsel: May I ask one more question which has arisen from some that your Honor asked?

The Court: Yes.

By Defendant's Counsel:

Q. If the case involved the precise point suggested by his Honor as to whether or not the defendant
60 had exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror? A. I think it would.

By Defendant's Counsel: I again submit my challenge to the favor, because that is the question in the case.

By the Court:

Q. Do you mean to say that you would assume that the newspaper had not exercised due care, irre-

spective of the character of the article or the cir- 61
cumstances of the case? A. No; I do not.

By Defendant's Counsel:

Q. Will you tell us precisely what you do mean?

The Court: I think he has been catechised sufficiently.

By Defendant's Counsel:

Your Honor overrules my challenge, I understood you to say?

The Court: Yes.

The counsel for defendant thereupon submitted a challenge to the favor. The Court overruled the challenge and the juror was sworn. To which ruling and decision of the Court the defendant's counsel did then and there duly except, which exception was noted and allowed. 62

Counsel for defendant asked leave to excuse the twelfth juror, and stated that he did this for the purpose of being able to raise the question as to an exception taken by him as to a challenge to the favor, during the examination of Alonzo B. Jones.

The Court overruled the challenge and counsel for the defendant then and there duly excepted to such ruling and decision of the Court, which 63
exceptions was noted and allowed.

The counsel for defendant thereupon admitted and stipulated in open Court that Mr. McDonald's position, socially and in a business way, is of the highest in the community, Cincinnati or New York, and that his character is of the best.

To maintain the issues on his part the plaintiff was called as a witness, and first being duly sworn testified as follows:

I am the plaintiff in this action. I reside at Cincinnati, Ohio and have resided there since 1857. I

64 have been engaged in business in Cincinnati ever since 1857 in merchandising, mining, banking, railroads and manufacturing. In 1892 I had business connections with various parts of the country; States in the West and South. Among them Ohio, Kentucky, Indiana, Illinois, Kansas, Nebraska and all the States south of the Ohio River, and I did business with all those States. My name is connected with the business done with all those States and is on every letter head.

Plaintiff's counsel then put the following question:

Q. Will you tell us, in 1892, at the time this publication was made, in what institutions and concerns you were interested as director, president or other-
65 wise?

Which was objected to by defendant's counsel on the ground that it was immaterial and irrelevant to these issues, the plaintiff's character not being questioned, and his business and social standing not being questioned; and he having given evidence showing the business that he does with a large number of States; it now becomes immaterial to go on and show what particular clubs he was a director in, or corporations.

The Court: It is entirely competent for him to show his business and social, public and private standing.

The Court overruled the objection and ad-
66 mitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as follows:

A. I was president of the Standard Oil Company of Kentucky; of the Consolidated Coal and Mining Company. which is a mining corporation of Ohio; I was president of the Commercial Club of Cincinnati, a business organization composed of fifty of the leading citizens of the city; I was vice-president of the Cincinnati Museum and Art Association; I

was a member of the College of Music of Cincinnati, 67
one of the Board of Trustees; I was a trustee and elder in the Second Presbyterian Church of Cincinnati, one of the most influential churches of our denomination in the State; I was director in the Cincinnati, St. Louis and Chicago Railroad, known as the Big Four; also in the road known as the Cincinnati Southern, a road leading from Cincinnati to New Orleans; and of the Queen City Club, which is the social club of Cincinnati; and several other small institutions.

The witness then continued as follows:

On the 17th, 18th and 19th of August, 1892, I was attending to my business in Cincinnati; at home in 68
Cincinnati with my family. My family consisted at that time of my wife, daughter, her husband and two children.

The counsel for the plaintiff then read the article complained of in this suit:

"Missing Millionaire McDonald Located.

"CINCINNATI, O., Aug. 17.—McDonald, Southern Ohio Manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada." 69

Counsel for defendant thereupon admitted that every statement contained in that article was incorrect, except the statement in the head line that Mr. McDonald was a millionaire.

Plaintiff's counsel then put the following question:

Q. When was your attention first called to that article?

70 To which question counsel for the defendant duly objected on the ground that it was immaterial and irrelevant.

The Court overruled the objection and admitted the evidence, to which ruling and decision of the Court the defendant did then and there duly except, which exception was noted and allowed. The witness then answered the question as follows:

A. Very soon after its publication; I don't know just how many days.

Plaintiff's counsel thereupon put the following question:

71 Q. In what way was it called to your attention?

To which question counsel for defendant objected on the ground that there is nothing in the pleadings which justifies any such evidence. That could only come up if there was some charge of special damages. It is not understood this complainant charged anything except the publication and the *innuendo* which they aver reflected upon Mr. McDonald in certain aspects; and on the further ground that there is nothing in the complaint that avers that plaintiff was injured in his business.

72 The Court: I suppose it is competent to show that the plaintiff read this article and when he read it.

By Defendant's Counsel: That is not the object with which it is put, I suppose.

The Court: You can show it.

Counsel for defendant objected to the admission of the evidence on the further ground that is not material unless plaintiff means in this way to endeavor to prove that such an article was published, and on the ground that even then it would not be competent evidence for

plaintiff to swear that he read the article in the newspapers. 73

The Court: It is competent upon the question of damages if upon no other—entirely so.

Defendant's counsel further objected on the ground that there is nothing in the pleadings to justify this particular proof.

The Court: There need not be. It is not special damages; it is general damages.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed. 74

To which question the witness answered as follows:

A. It was first called to my attention by a gentleman on the street, in Cincinnati.

The witness then continued to the Court:

It was called to my attention after that time frequently. A number of persons, I don't know how many, quite a number of persons spoke to me about this article and called my attention to it, but not at other places than Cincinnati, that I recollect of. I remained at Cincinnati for some time after the publication of this article; I think for over a month at least; possibly two months. 75

The witness then continued as follows, to plaintiff's counsel:

I am connected with the Third National Bank of Cincinnati, the largest bank in the State. I was not the "Southern Ohio Manager of the Standard Oil Company"; I never heard of any such a position. There are a number of Standard Oil Companies organized under the different States. My connection was with the Standard Oil Company of Kentucky, incorporated under the laws of Kentucky, with

76 headquarters in Cincinnati. I was president of this company. That corporation had a Southern trade. Its trade was about equally divided between States in the West and Northwest and the South. As president I was engaged in the active management of the affairs of that concern and had business relations also, and many business acquaintances in New York City and some also in Europe.

CROSS-EXAMINATION:

On CROSS-EXAMINATION by defendant's counsel, the witness testified as follows:

The Kentucky Standard Oil Company is a cor-
77 poration under the laws of Kentucky, and there is also a Standard Oil Company incorporated under the laws of Ohio. I do not know who are the officers of the Ohio corporation. I am not interested in it.

Q. Have you any business relations with it? A. We have to some extent, yes.

Q. I understood you to testify on your direct-examination that in some business or another you sent out letters or papers, the letter heads of which bore your name, and that those letters went into Ohio, Indiana, Illinois and nearly all the States south of the Ohio River. Was I in error? A. No, you are right.

Q. What is that business paper on which your
78 name thus goes out? A. We have agencies in all the leading cities in the West and South.

Q. What do you mean by "we"? A. I mean the Standard Oil Company.

Q. Has the Standard Oil Company of Kentucky agencies in Ohio? A. Yes, sir; there is a Standard Oil Company in Ohio besides this company which I represent; it is not under the same management. It is a totally distinct concern. The Kentucky corporation has agencies in all these States of which I have spoken and I am the head of that corporation and the head of all that business. There is another

Standard Oil Company in the City of New York, and 79
State of New York.

Q. What territory does that corporation cover? A. I don't know what territory the corporation covers.

By the Court:

Q. Are these various Standard Oil Companies affiliated companies, or are they entirely distinct? A. They are entirely distinct. They are different organizations, different boards of directors, organized under the laws of different States.

Q. What do we understand by the Standard Oil Company that we hear so much about? A. I don't know of any The Standard Oil Company. 80

Q. I supposed there was a great octopus which spread out all over the United States, *The* Company? A. That is a mistake. There is no such company.

By Defendant's Counsel:

Q. What is the nature of the business that this corporation which you represent does, pray? A. What branch of business are we engaged in? The corporation, of which I am president, is engaged in the handling of petroleum and its different products, and other articles, such as turpentine, resins and linseed oil. That corporation was formed six or seven years ago. 81

By the Court: Is this the Rockefeller concern?
The Witness: No, sir.

The witness continued to defendant's counsel:

There are in the United States at least half a dozen Standard Oil Companies. I cannot tell where they are all located. It is very likely that the stockholders to some extent are the same in this Kentucky corporation as those in the New York corporation.

Q. Have you not made statements to that effect? A. I don't know.

82 Q. Don't you know? A. A man may be a stockholder to-day and not to-morrow.

Q. Don't you know who the main stockholders are in the corporation of which you are president? A. I know that I am one of them.

Q. Do you not know the others? A. No, I cannot state who they are.

Q. Do you not know whether these gentlemen in New York, who are connected with the Standard Oil Company, are also in the corporation of which you are president? A. My belief is that no members of the Standard Oil Company in New York are to-day stockholders in our company.

Q. Don't you know that they are? A. No; I do
83 not.

I was not the Southern Ohio manager of the Standard Oil Company; I was president of the Kentucky Standard Oil Company.

Defendant's counsel thereupon admitted that the defendant is a corporation created by and existing under the Laws of the State of New York; that the defendant published in the New York, New Jersey and Brooklyn edititions of the *World* newspaper of August 18, 1892, of and concerning the plaintiff, the alleged libel on which the suit is brought; that the newspapers marked "Exhibit 1, October 20, 1893," by the stenographer on the former trial of the case are
84 copies of said three editions of such newspaper of August 18, 1895; that the circulation of the foregoing editions of the *World* on the 18th day of August 18, 1892, was 384,895 copies.

Plaintiff's counsel then offered in evidence the three newspapers referred to.

The counsel for the defendant duly objected to the reception of the evidence as immaterial and on the ground that in the stipulation which was given there was contained this clause: "This latter stipulation, however, is not to be treated as assenting that said papers be received

in evidence," leaving defendant to make such 85
objections to their being received in evidence as might, by his counsel, be deemed proper. On the further grounds counsel for defendant objected to the admission of the evidence that the incorporation of the defendant is admitted; the publication of the alleged libel at the time and place set forth is admitted; the extent of the *World's* circulation is admitted—which makes plaintiff's cause of action in all those regards complete. On the ground that it is absolutely immaterial to this issue to lumber it up by putting in evidence twenty, thirty, forty or fifty pages of matter which have no bearing upon this particular article which is complained of, or upon 86
this litigation. Counsel for defendant further objected to the admission of the evidence as being entirely immaterial, and, so far as anything else concerned in those papers except this particular article, as irrelevant and incompetent to the issue.

The following colloquy then took place:

The Court: I think it is entirely competent for you to show the paper to the jury. It may be of some importance to show whether this article was published in a conspicuous or an inconspicuous place in the paper, and there is no way to show it except by the production of the paper itself. You, of course, 87
do not want to consider the whole of the paper in evidence.

By Plaintiff's Counsel: Not at all. What I want in evidence is the page of the paper containing that article.

The Court: I will overrule the objection and allow you to introduce the copies for the purpose of showing the location of the insertion.

By Plaintiff's Counsel: Not merely that. I accept that ruling as far as it goes, but I think I am entitled to have in evidence the page of the paper.

The Court: Certainly.

88 Defendant's Counsel: To that I have no reasonable objection, but here are thirty or forty pages and we cannot go over all that with the jury. If one page is shown the jury and if they want to show there is a more important page, I don't mean that at all.

The Court: They are entitled to produce the paper and show to the jury where the article is inserted.

By Defendant's Counsel: I should not take an exception if that were what it would really limit them to. I will note an exception.

89 The Court overruled the objection and admitted the evidence, which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as follows:

The three copies of the *World* referred to are received in evidence and marked Complainant's Exhibits A, B and C.

The Court: This is offered simply for the purpose of showing how conspicuous the insertion is.

90 The following is a skeleton page of the said three editions of the same, showing the article complained of and its location:

To maintain the issues on his part the plaintiff 91
then called as a witness—

LEVI C. WEIR, who first being duly sworn, testified as follows:

I am president of the Adams Express Company. I am living in New Jersey at present and my business is in New York. I formerly resided in Cincinnati, until last September. I had charge of the company's lines west of Pittsburgh and was also interested in some little local enterprises in Cincinnati; have been a resident of Cincinnati since 1859. Until last fall I had an extensive business and social acquaintance in Cincinnati and was quite well acquainted with Mr. McDonald.

Q. Will you tell us the character of your acquaint- 92
ance, whether it was business, social, or what its general character was? A. Both.

The witness then continued as follows:

I know the social and business standing of Mr. McDonald quite well.

Plaintiff's counsel then put the following question:

Q. Can you tell the jury what his business and social standing is, or was in August, 1892?

To which question defendant's counsel objected on the ground that it was immaterial, because the character or high business standing of Mr. McDonald is not questioned by the defend- 93
ant who has stipulated it. On the ground that it was incompetent and irrelevant in this case, for the reason that the character of the plaintiff is not and will not be questioned, and defendant by his counsel has so stipulated. On the ground that under the authorities, evidence of this kind, where there is no question at issue as to the standing of the plaintiff, has not been heretofore received.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

94 To which question the witness answered as follows:

A. It was of the highest.

Q. Both business and social? A. Yes, sir.

CROSS-EXAMINATION:

On cross-examination by defendant's counsel, the witness testified as follows:

Q. Mr. McDonald's social and business standing in Cincinnati is as high to-day as it ever was, is it? A. Unquestionably. It was when I left.

Q. You have continued your acquaintance since? A. Yes, sir.

Q. And you know as well as I do that his position
95 is just as high to-day as it ever was? A. Oh, yes.

To maintain the issues on his part the plaintiff then called as a witness—

SOLOMON S. CARVALHO, who first being duly sworn, testified as follows:

In the summer of 1892, in August, I was the publisher of the *World* newspaper in New York City; I presume you might call it general manager.

Q. On the previous trial you were asked this question and you gave this answer:

"Q. What office did you hold in August, 1892? A. General manager of the paper."

96

Is that true? A. Yes, but I think I answered that I was the publisher of the paper, if you will read a little further. I was thoroughly familiar with the general management of the newspaper.

Q. I show you Plaintiff's Exhibits A, B and C, which were put in evidence this morning, being pages of the Brooklyn, New York and New Jersey editions of the *World* newspaper, and call your attention to the article which contains the libel "Missing Millionaire McDonald Located. Special to the *World*." Special to the *World* means a dispatch sent by telegraph to the *World*, does it not? A. It

means a dispatch sent by one of our own correspondents, as differing from a dispatch sent by the Associated Press. 97

Q. And sent by telegraph? A. By telegraph, yes. It might be sent by cable, at least a special might, too.

Q. It comes over the wire? A. Yes.

Q. Will you tell the Court and jury whether such specials were repeated before publication by the *World?* A. No, sir.

Q If I understand you correctly, then, such dispatches as the one here spoken of, and the other dispatches which appear upon this page of the paper, were published by the *World* without being repeated by the telegraph company before publication? 98 A. Yes, sir.

Q. They were not repeated? A. No, sir.

Q. When these dispatches are received by the *World* newspaper they go to what are known as telegraph editors, do they not? A. Yes, sir.

Q. At the last trial of this case you were asked these questions and you gave these answers:

Q. You were asked by the Court as follows:

"I would like to know what is the authorized custom in your office in regard to the powers or duties of telegraph editors to examine into the truth or falsity of a special dispatch sent to them from a distant city?" 99

To which you answered as follows:

"Unless the dispatch in itself is contradicted and raises a natural doubt in the mind of the telegraph editor as to its accuracy, he has no right to change the facts, and he must send that dispatch down to the composing-room as he receives it or leave it out of the paper. If there is any doubt he has no right to print it."

Then the Court said: "Just repeat that," to which you answered, "I will tell you more briefly."

A. Pardon me; there is a mistake in there.

100 Q. Let me read it first:

"I will tell you more briefly. Unless the dispatch *per se* raises in the mind of the telegraph editor a suspicion of its accuracy then he cannot change the facts; and it is optional with him then to judge of the importance of the dispatch and withhold it from the composing room or have it set up."

Q. Did you so testify? A. With one exception. There is a mistake in that first part.

Q. What is the exception? A. You said, "unless the facts are contradicted." What I testified to was, "unless the facts are contradictory." We have to trust to the correspondent for the accuracy.

101 Q. You change the word "contradicted" to "contradictory"?

By Defendant's Counsel: I don't think he changes any word. He corrects the word.

Q. You wish this corrected by changing the word "contradicted" to "contradictory?" A. As that changes the whole sense I would like to explain myself.

Q. I will read it with the correction:

"By the Court:

"I would like to know what is the authorized custom in your office in regard to the power or duties
102 of telegraph editors to examine into the truth or falsity of a special dispatch sent to them from a distant city? A. Unless the dispatch in itself is contradictory and raises a natural doubt in the mind of the telegraph editor as to its accuracy, he has no right to change the facts, and he must send that dispatch down to the composing-room as he receives it or leave it out of the paper. If there is any doubt he has no right to print it.

"Q. Just repeat that? A. I will tell you more briefly. Unless the dispatch *per se* raises in the mind of the telegraph editor a suspicion of its accuracy, then he cannot change the facts, and it is

optional with him then to judge of the importance 103
of the dispatch, and withhold it from the composing-room or have it set up."

Did you so testify? A. I may have testified to that.

Q. Are those statements true? A. They are true, but confusing.

Q. They are true? A. But confusing. The telegraph editor has no power to change facts at all. He can leave them out or he can print them, but he cannot change them.

The Court: I think that is what you said in your statement there.

Q. Is that the only correction you wish to make? 104
A. That is the only correction.

CROSS-EXAMINATION:

On cross-examination by defendant's counsel the witness testified as follows:

My connection with the Press Publishing Company, the *World* newspaper, commenced in October, 1887. At first I was the city editor of the *Evening World*. I remained in that position perhaps a year to eighteen months; then I became managing editor of the *Evening World*; then I became editor, with general control of the evening edition; then I became assistant to the vice-president of the Press 105
Publishing Company, and finally became the assistant vice president, or executive officer of the company, and after that publisher. I became publisher around three years ago, a little over that, I think; and that is the technical name of the position that I have held for the three years past. The duties that I have performed as publisher have been supervisory duties. My main duties have been in control of the finances of the paper, of the business end directly, with the general supervision of the editorial end, excepting the editorial page, that is, the policy of the

106 paper. I had general supervision of the conduct of the paper, with the exception of the editorial page.

Plaintiff thereupon rested his case.

To maintain the issues on its part the defendant then called a witness.

SOLOMON S. CARVALHO, recalled on behalf of the defendant, who being first duly sworn, testified as follows:

Going into detail as to my duties, I overlooked all the payrolls, O. K.'d the bills, corrected mistakes,
107 made contracts, in fact looked after the whole of the business from the standpoint of responsibility. I became publisher somewhere around 1891 or 1892, previous to the publication of the article complained of in this action, in August, 1892.

The *World* got its telegraph news in the month of August, 1892, in two ways; one, from the Associated Press, which is an organization which has offices all throughout this country and Europe, and secondly, by its own special correspondents, of which it had about 1,200. Those special correspondents were located all over the United States and in Europe. Their various dispatches (of the latter class) were transmitted to the *World* office over the
108 Western Union and over the Postal's wires and were delivered in two ways; either by messengers direct to the telegraph office, which was the unusual way; the more direct way being that we had a number of operators from the telegraph companies whom we gave office room to, in order to save the delay due to the messengers. So that most of the telegrams in many cases were delivered directly to these employees at the *World* building, they running their wires over to the *World* office. The dispatches from the wires at the *World* office were received by the employees of either the Western Union Telegraph Company or the Postal Telegraph Company. Both

of these companies had their own employees in the 109
World office receiving such dispatches in the month of August, 1892, at the time of the publication of this alleged libel. These special dispatches came from various parts of the United States and Europe, but the cable dispatches—we had no cable wire to our office—they were brought by messenger, so that only dispatches from correspondents in the United States and Canada were delivered to the *World* office to the employees of the telegraph companies at such office. In the United States and Canada at that time the *World* had more than 1,200 special correspondents. On an average in the month of August, 1892, there were received over the telegraph around 120,000 words a night, which were published in the 110
World the following day. This is altogether, including specials. I should say about 30,000 to 40,000 were specials, although I do not know for a fact; not less than that. When I say night, I mean after six o'clock at night; between six o'clock and the time the paper goes to press. The last form of the paper goes to press at five minutes past two. We had the regular arrangement with the Postal Telegraph Company in August, 1892. Our correspondents filed their copy at the office in such city or town as they might be, and it was telegraphed to the Postal office and transmitted by wire to the *World* office, where it was received by the Postal people. Our correspondent filed his copy in the 111
Postal office. He either sent it by a boy or carried it there. He wrote his copy in his own office.

Q. Did your correspondent deliver his copy of the dispatch to the Postal Telegraph Company at the various cities wherever they might be for transmission to you? A. I am not sure. He might be a couple of miles away, his office might, from the telegraph office. Then a messenger would take it.

By the Court:

Q. He would send it the same as anybody else? A. Yes, sir.

By Defendant's Counsel:

Q. Your arrangement with the Postal Telegraph Company and the Western Union Company was to transmit those dispatches to you at New York at some specified rate, I suppose? A. Yes, sir.

Q. Now, what I want to reach is this: Did the dispatch come direct to the *World* office or did it go to the Postal Telegraph office and then was, as it were, switched over to the *World* office? A. I don't know.

Q. All you know is the dispatch was received by the Postal Telegraph employees at the *World* office? A. Yes, sir.

Q. Were those employees under your direction or
113 control? A. No, sir. The dispatches received by the employees of the Postal Telegraph Company during the month of August, 1892, were delivered to the telegraph editor in charge; I think to Mr. Lewis. The duties of the telegraph editor in charge are to take telegraph copy as it comes to him and to hand it to such of the sub telegraph or copy editors as were disengaged at that time. We had about ten copy readers then and as each man finished the particular piece of work which he was editing he received more from the telegraph editor, who was practically the reservoir of copy—the chief telegraph editor. The dispatches as they came were distributed then among sub-editors. Then the sub-editor read the dis-
114 patch, edited it and put a head on it, put a caption on it; then it was sent to the composing room. These telegraph editors were located in the World Building, in the editorial rooms, which were at that time on the 13th floor. The telegraph editors and the main telegraph editor had been in the employ of the *World* in August, 1892, for three or four years.

By the Court:

Q. You say the sub telegraph editor sent the dispatches to the composing room after he put a caption on it? A. Yes, sir.

The witness continued as follows to defendant's 115
counsel:

The composing room is where the typesetting machines and the cases containing type and the printers who set up the type and the operators who work the machines and the proof readers are. It is the place where the copy is put into type and where the men are located who set type. The dispatch is set up in type and a number of proofs are taken. One set of these proofs go to the proof readers and three sets go upstairs, or perhaps four. These go to the night editor, to the editorial department and to the editor in charge and to the editorial room where the editorial writers are. They differ from the night editor in this: The night editor is an executive who makes 116
up the paper, and who reads the proofs for the news. The editorial writer would use the proof, for example, in case Mr. Cleveland would give a message that would require editorial comment; a dispatch of this kind would go just as I said all the proofs go. They are not sorted out downstairs. They go to the night editor, to the editorial writer and to the managing editor or editor in charge; they each of them get a full set. Then they are read, and the editor decides what page he wants the article to go on. The night editor decides where it is to appear and decides what pages they are to go on, subject of course to consultation with the managing editor. Unless the managing editor has some particular 117
ideas the night editor's authority governs. The managing editor generally makes up the first page himself. Then if there are any mistakes, any typographical blunders, any question about anything which is apparent by the copy, investigation is made. In the meantime the proof readers down stairs take the original copy which was sent down to them and the first proof that is taken, and compare that to see whether there are any mistakes, and they make the proof or they correct the proof so that it absolutely agrees with the original copy.

118 This proof with the proof reader's corrections are given to compositors down stairs, whose duty it is to correct them and revise the proof, and the revised proof with these corrections goes upstairs again; so that the night editor and the editor in charge or managing editor get two sets of proofs, the original proof and the corrected or revised proof; so that each proof is read twice by the proof readers, and are presumed to be read twice by the editor in charge and the night editor. Of course when it gets around two o'clock, and very late dispatches, they only get one reading, that is, when they get into a hurry to get down the last page. There was a general form used by the Postal Telegraph Company on
119 which these special dispatches were put in the month of August, 1892. I can get one of those forms at the office.

Q. You did produce one on the previous trial? A. Yes, sir.

Q. Is that one of the forms (handing witness paper)? A. Yes, sir.

Q. Is that an original dispatch delivered to the Press Publishing Company by the Postal Telegraph Company? A. I should think it was.

Q. Is that paper one that is in the usual condition that dispatches that they delivered were in August, 1892? A. All type written dispatches were like those, with the typewriting on the back of the dis-
120 patch; they had a blank and where the dispatch was written out in ink it was written on the front of the blank, and when it was typewritten it was put on the back; that is the manner in which the dispatch is typewritten.

Q. Look on the back of that paper and state on what day that was delivered to the *World*. See if you can identify the date? A. It has "October 23."

Q. What year? A. There is a piece of brown paper pasted over it; I cannot see.

The dispatch was thereupon received in evidence and marked Defendant's Exhibit No. 1 of May 27, 1895.

"**Defendant's Exhibit No. 1**" of May 27, 1895. 121

FOLLOW MANHATTAN DAY,
ALTSHELER.

Hauled down Britain's Flag for Mischief.

(Spl., &c.)

CHICAGO, Ill., October 21, 1893.

Two days ago while the Earl and Lady Aberdeen were being entertained at Blarney Castle on the Midway Plaisance the British flag which waves over the Castle was twice hauled down by unknown persons. To-night the flag was hauled down again, but the guards captured a party of three young men 122 who did it and locked them in Woodlawn Police station. Their motive was mischief.

ALTSHELER.

2 D.
H.

(N. B.—The above appears in typewriting on the back of the regular blank of the Postal Telegraph Cable Company for press dispatches, with the headlines in pencil.)

After the dispatches have been received and edited and published they are filed; they are kept from one to six months—they were formerly; now they are kept for two years; in August, 1892, they were kept 123 from one to six months.

Sometimes in the autumn of 1892, I directed an inquiry to be made to find a dispatch said to have been received on or about the 17th of August by the *World* from Cincinnati, and which is said to have contained the dispatch which is complained of in this action.

The defendant's counsel then put the following question:

Q. All I want to know is, did you at any time in the summer or autumn of 1892, give directions to

124 anybody in the employment of the *World*, or in your employment, to find this particular dispatch? A. Yes, sir.

The witness then continued to defendant's counsel:

Q. At what date was that? A. About November 17th. I told Mr. Farrelly to look for this dispatch. Mr. Farrelly was assistant managing editor. He did the executive work, being there in the day time, and looked after the correspondence, and so on. He made a report to me and delivered the dispatch to me. I gave the dispatch to my stenographer to send to Bowers & Sands, our counsel, three or four days after I got the latter—after the 17th of November.
125 Miss Oakes was my stenographer then; is still my stenographer. I dictated a letter containing these documents, and sent it down to Platt & Bowers. I did not enclose this original dispatch myself; I directed that it be enclosed; I gave it to my stenographer to send. I did not myself compare the dispatch with the article that was published in the *World*. No, I did not have a stenographer copy it.

Q. I forgot to ask you one question; in reference to all these telegrams that are received every night between, I think you said, six o'clock and two in the morning, is it possible to have them repeated? A. No, sir.

Q. That is to say, within the time when they were
126 to be put into the newspaper if published the next day, it is impossible to have them all repeated? A. Yes, sir.

I am familiar with the manner in which other newspapers in the City of New York conduct their business. I am familiar with the manner in which they conduct their business as to the reception of dispatches from special correspondents in other cities.

Defendant's counsel then put the following question:

Q. Can you state what is the custom in the newspaper offices in this city as to having dispatches repeated? 127

To which question the counsel for the plaintiff objected.

The Court sustained the objection and refused to allow the question, to which ruling and decision of the Court the counsel for the defendant duly excepted.

Q. Had the *World* office any rules for the guidance of its reporters, editors and employees in August, 1892? A. Yes, sir.

Q. Is this a copy of such rules? (Handing witness a paper). A. Yes, sir. The *World* newspaper, 128 or the Press Publishing Company had in August, 1892, a set of published rules for the use and guidance of its copy readers and writers; I prepared them. The main facts in them were given to me by Mr. Pulitzer, but the manual labor of putting them into shape was done by me. They were given to each copy reader and to each reporter. They were posted about the building. Some of them were pasted at one time upon the desks of the copy readers and some were kept in the drawers.

Counsel for defendant offers in evidence the set of rules referred to.

Q. Is that a set of such rules? A. Yes, sir. 129

The set of rules referred to was received in evidence and marked Defendant's Exhibit No. 2 of May 27th, 1895.

130 **Defendant's Exhibit No. 2, May 27, 1895.**

THE WORLD.

RULES FOR COPY READERS AND WRITERS.

The Copy Editor's motto should be improve.

A story can be made or marred in the telling. See that it is made.

Rewrite where rewriting is necessary.

Form and quality must always be considered.

Use short sentences.

Avoid looseness of construction.

131 Cut out "ands" and "whiches" wherever their elimination does not destroy the sense.

Cultivate clearness and terseness.

Have no introductions. Let facts begin the stories.

Cut out all verbiage.

Simplicity in style makes strong writing. Seek it.

Avoid ambiguity.

Allow no bias or editorial opinion to get into a news story.

Eliminate everything that verges on coarseness.

Pass nothing unless you understand it? Where there is doubt investigation is not waste of time.

Avoid superabundance of adjectives. They de-
132 tract from strength.

Paragraph freely, but do not hurt the sense by paragraphing at wrong places.

In long stories use plenty of sub-heads.

Remember that head lines are to tell the reader what the story is about.

Print only what is interesting in a story.

Know what to leave out.

Incident is valuable in important stories, but is too frequently waste of space in unimportant ones.

Save a word or line wherever you can. It not only improves the individual story, but makes room for other good news.

Make every item as attactive as possible. 133

Pass no simple except it is apparent and good.

No single head item should exceed fifteen lines, and ordinarily no double head item exceed forty lines.

Never use two words when one will express your meaning as well. "The Celtic Society held a meeting last night" is not as good as "The Celtic Society met last night."

Never use a five or six syllable word when you can use one of two syllables.

Avoid carelessness in the use of words, such as some for somewhat, young lady for young woman or girl, bogus for spurious, lenience for lenity, and the hundreds of others which, though often used, 134 always detract from form and quality.

Use words of Anglo-Saxon origin rather than words of Latin origin. The simplest and shortest Anglo-Saxon words are best.

Use dialogues and colloquialism wherever available. A man's own account of an occurrence in the first person is stronger and better than a third person version.

Remember that accuracy is the highest aim."

Q. Did the *World* also at that time have a set of rules for its correspondents? A. Yes, sir.

Q. Is that a copy of such rules (handing witness a paper)? A. Yes, sir. 135

Counsel for defendant offered in evidence the copy of rules last referred to.

To the admission of which counsel for plaintiff objected to unless there was some evidence that they reached the correspondents.

Q. What was done with these rules for correspondents; how were they distributed? A. They were mailed to every correspondent.

Q. When? A. Prior to that time I think Mr. Chamberlain prepared these rules.

136 By the Court:

Q. You speak of a great number of correspondents; these men were salaried? A. Some of them get salaries; some of them on space rate. The majority were on space rate, and got paid for what they sent.

Q. Whether you used it or rejected it? A. It depended upon whether it was ordered.

Q. Whether it was ordered? A. Yes, sir.

Q. Could you order such a dispatch as this one that was published about the plaintiff? A. Not an inaccurate dispatch.

Q. Could you order such a dispatch; do you mean to say you sent an order in advance? A. If there
137 was any case we knew about, any important case in any big city, or in any little town, or anywhere, the correspondent would telegraph to us, "How much do you want about this, how many words?" and we would telegraph back to send 200 or 300 or 400.

Q. In that case you paid whether you used it or not? A. Yes, sir.

Q. Then you have a lot of random correspondents, I suppose? A. Yes, sir.

Q. Instructed to send you news that they think might be of interest to your paper? A. We have in big cities correspondents who have offices in the offices of other large papers there, and they send to
138 us that which they think is good, but if there is anything very important then they wire on and ask us how much we want. Sometimes we pay for what we use and sometimes the men are on salary. This correspondent was on space, the same as most of our staff.

Q. Did you know what his name was? A. Yes, sir.

By Plaintiff's Counsel:

Q. Did you know at any time in August what his name was? A. I did not know anything about this dispatch because I was in Europe.

Q. Did you know in August what his name was? 139
A. Our Cincinnati correspondent? Yes.

By the Court:

Q. Was his name signed to the dispatch when you received it? A. I did not receive any.

Q. When it came to the office was the correspondent's name signed? A. I think it was; I am not sure.

Q. You do not know that? A. No, sir. I have nothing to do with keeping telegrams as they come in at night. I leave at six o'clock in the day time.

By Defendant's Counsel:

Q. You say these instructions were sent to all the 140
correspondents? A. Yes, sir.

Q. Did those correspondents include Mr. Tarbell, of Cincinnati? A. Yes, sir.

By Plaintiff's Counsel:

Q. How do you know these were sent to Mr. Tarbell; what did you have to do with it? A. I have inquired since.

The Court: That won't do. You don't mean to say you sent him any instructions?

The Witness: No, sir.

By Defendant's Counsel: 141

Q. Did you give directions to have copies of these instructions sent to all correspondents, including Mr. Tarbell? A. The instructions were in vogue before I came in charge and they were sent regularly.

Q. Where did you inquire to find out whether these instructions had been sent to Mr. Tarbell?

To which question plaintiff's counsel objected as irrelevant.

The Court sustained the objection and refused to admit the evidence, to which ruling the

142 defendant duly excepted, which exception was duly noted and allowed.

The following colloquy then took place:

The Court: You better let that go in, Mr. Deming.

By Plaintiff's Counsel: I have no objection to his saying it was the rule that these things should be furnished to correspondents. I object to his making this witness testify that they were sent. I will withdraw my objection.

The Court: We don't want any technical objections. We want to try the case so that if there is a verdict it will stand, if possible. Where is Mr. Tarbell?

By Defendant's Counsel: He is in Cincinnati. I
143 have Mr. Gosdorfer here who sent this dispatch. I shall produce him and by him I think I shall be able to prove that this book was in the hands of Mr. Tarbell.

I did not know Mr. Alexander McDonald, the plaintiff in this action, in August, 1892; I had never known him prior to that time; I had no feeling of malice toward Mr. McDonald.

Q. Had Mr. Tarbell, your correspondent in Cincinnati, any authority to employ any one under him to send dispatches to the *World?* A. All correspondents are authorized, when they cannot be on duty, to select some responsible person to represent
144 them.

Q. Who employed the correspondents and who had employed them prior to August, 1892, on the *World?* A. Mr. Chamberlain was in charge of the correspondents at that time. Mr. Chamberlain at present is managing editor of the *World*. In August, 1892, he was night editor in charge. I do not know whether he had employed Mr. Tarbell; I believe he did. Mr. Tarbell had been employed as a Cincinnati correspondent of the *World* a long time before August, 1892. The foreman of the composing room employs the proof readers.

In August, 1892, he was Mr. Jackson; he was em-

ployed by the Press Publishing Company; he is still 145
in their employ. He is a careful man and very capable.

Counsel for defendant put the following question:

Q. Can you tell me whether prior to August, 1892, there had ever occurred in the *World* office so serious an alteration or change in a dispatch as to change the name of the individual concerning whom it was sent, or to change the entire substance of the dispatch?

To which question plaintiff's counsel objected.

The Court sustained the objection and refused 146
to allow the question.

To which ruling and decision of the Court the defendant duly excepted, which exception was noted and allowed.

CROSS-EXAMINATION:

In cross-examination by plaintiff's counsel the witness testified as follows:

I sent to Mr. Farrelly for a copy of the dispatch. I remember what he sent me in response to that request. I sent for the dispatch and all the information which he had, and I got back a clipping from the paper and three or four pages of writing con- 147
cerning the details and the original dispatch.

By the Court:

Q. Do you say the original dispatch? A. The dispatch from which we made our copy.

To Plaintiff's Counsel:

My impression is that there was among those papers a telegraph blank in the form such as has been put in evidence here by Mr. Bowers. My best recollection on that subject is that the original dis-

patch—my impression is that it was on a telegraph blank. I am quite certain of it, to the best of my belief; as certain as I can be of anything. I am more certain now than I was a year a and half ago, when that same question was asked me. I have not seen anything since that has refreshed my recollection.

On the previous trial of this case I was asked this question and gave this answer:

"Q. Did he, Mr. Farrelly, send you, among others, anything which purported to be a telegraph blank of the form I hold in my hand?" That was this same telegraph blank that was put in evidence this morning. My answer was:

"A. My impression is he did, but I am not certain whether it was on a telegraph blank or not."

Q. You recollect testifying that, don't you? A. I may have testified to that. I don't recollect it at this moment.

Q. I read from the record. What makes you more certain now than you were a year and a half ago, which was a year and a half nearer the time? A. I have in my mind the impression, as I had at that time, that this was on a yellow telegraph blank. I cannot be absolutely sure any more than I was then, but, to the best of my belief, it was on a telegraph blank. I wish to make it clear that I am absolutely sure of having seen that dispatch—absolutely sure. I am sure that I received from Mr. Farrelly the original dispatch. I had my stenographer send it to Bowers & Sands; I directed her to; I believe my stenographer did send it; I cannot say that the stenographer sent it. I never received any acknowledgment of that paper from Bowers & Sands; I believe they got it. I do not know that they ever got it. I do not know how it was sent, whether it was sent by mail or by messenger. I don't keep any record of my letters to indicate whether they are

sent by mail or messenger. I have a copy of the letter which I believe contained it. 151

By Plaintiff's Counsel: Have you that here?

By Defendant's Counsel: I have the original letter here.

A Juror: When you speak of that do you mean the original written copy that this Mr. Farrelly wrote and sent to the telegraph office; is that the paper, when you say dispatch?

By Defendant's Counsel: No; what we mean here is the copy that the Postal Telegraph Company delivered in New York. The original, which was written in Cincinnati, we shall produce and prove in a few moments.

152

Q. Is this the letter you refer to (handing witness paper)? What is the date of that letter? A. November 22, 1892.

Q. Is there anything in that letter about a telegraphic dispatch? A. It does not mention telegraphic dispatch, but I sent the telegraphic dispatch with other evidence in the case, all that I could get.

Witness reads the letter in question, as follows:

"Messrs. PLATT & BOWERS. Gentlemen: Enclosed please find information requested regarding several cases referred to in your communication of November 17th."

153

Q. Why do you say it contained this dispatch? A. Because in his letter of November 17th he asked for information in the McDonald case, and I sent that letter to Mr. Farrelly, and with the other matters I forwarded all the information that I had got for them in a letter on November 22d, of which this is the original letter, and there is no other letter that I have referring to it which contains the material asked for in the letter of November 17th.

Q. Did you send to Messrs. Platt & Bowers at that time any information in any other matters besides the McDonald suit? A. Yes, sir.

154 Q. Several other matters? A. Yes, sir.

Q. And that is the reason why you think there was something in this letter referring to the—— A. No, I absolutely believe that I sent it.

Q. That is the reason why you believe it? A. I gathered the information for them and naturally sent it to them. They had asked for it. It was necessary they should have it in the preparation of the case. Their letter asking for information in the McDonald suit I have. I am not sure. They have a copy in their office.

Q. How soon after the time you believe that you sent this dispatch to your counsel did you find that they never received it? A. I don't know. I think
155 when the case came near to trial they said they did not have it. That was the first intimation I had.

Q. How long was it before the case came to trial after this letter was sent? A. I don't remember but it was when they were preparing the case. This letter was dated November 22, 1892; the trial took place in October, 1893. I don't think it was fully a year after they asked for this information and I returned that I or they discovered they did not have it. I had several interviews with Mr. Buckley, of Bowers & Sands, in regard to the case, and I don't think they wanted it until perhaps nine months after. I don't remember seeing that dispatch at those interviews; probably I did not. My impres-
156 sion is that I did not see that dispatch after that one time that you think Mr. Farrelly gave it to me; I am not positive; I don't think I did. These dispatches are ordinarily kept from one month to six months; they were at that time. This dispatch purports to be dated the 17th of August, 1892. I made my search for it the middle of November. That is the date of that letter; that is three months later. I am sure it was not destroyed or lost at the end of the first month. I don't remember looking for any other dispatches. I don't know whether any other dispatches were missing.

Q. Is this the only dispatch you have had occa-

sion to look for? A. Well, I had been in Europe 157
and I had just got back on the 9th of November.

Q. This letter reads: "November 22, 1892. Platt & Bowers. Gentlemen: Enclosed please find information requested regarding several cases referred to in your communication of November 17th." Now, after having your memory refreshed by these questions, can you state any more clearly than you have stated what knowledge you have that this dispatch of which you have spoken was ever enclosed in that letter? A. I cannot say that it ever was enclosed in that letter. I simply directed it to be sent to Bowers & Sands.

Q. And you don't know how it was sent, whether by mail or messenger? A. No. My impression is 158
that important letters were sent by messengers, but I am not sure whether that was sent by messenger.

This is my signature. I sometimes have fifty or sixty letters a day. These rules have been put in evidence and govern the conduct of copy readers and writers. By copy readers and writers I mean the reporters and the copy readers or editors. "Copy" is a technical term which means matter to be published. When such a dispatch as has been spoken of comes to the *World* office it goes to these telegraph editors.

Q. And they have such authority as these rules give them? A. No, they have more authority.

Q. They have at least the authority that those 159
rules give them? A. Yes; but those rules are misleading in some respects, that is, they may be misinterpreted.

Q. They have such authority as the rules give them? A. Yes.

Q. And more, too? A. Yes. They have authority to condense and cut down; they have authority to eliminate, but nothing that is material, and they have authority to put head lines; in short, they have complete control of that dispatch until it gets into the hands of the night editor or the manager. When it goes to the composing room it goes there after

160 they have edited it, when it goes to the proof reader; the proof reader's business is to see that it has been set up in type just as it was edited by the telegraph editor. He has not any discretion except to see that it is printed right and spelled right—the proof reader. It was such a paper as that that I have just described that I suppose was found by Mr. Farrelly and delivered to me; such a dispatch. The *World* had over 1,200 correspondents, and each one of these correspondents was authorized to employ a sub-correspondent to do his work, and from these 1,200 correspondents the *World* received from 30,000 to 40,000 words every night. It was impossible for the *World*, under these circumstances, to repeat
161 messages sent it and to get out the paper. I mean to say and have them published the next day. In my judgment, that is a safe and prudent way of doing business for a newspaper.

Q. You think it is a perfectly prudent and safe thing for a newspaper receiving dispatches about public and private matters affecting the private rights of people and the public rights of people, commercial news and all kinds of news, from 1,200 correspondents, each one of whom may employ some other man in his place to print those dispatches without verification? Do you consider that a safe and prudent way of conducting the newspaper business? A. It is the only way that any news-
162 paper business can be conducted.

Q. It is a safe way because if a newspaper is bound to print it cannot wait to verify? A. We investigate our correspondents, go into their character, and they are usually able men on the staffs of other papers. For instance, we have a man on the *Chicago Times* and other big papers around the country—men whose positions guarantee them some standing and confidence.

Q. (Last question repeated.) A. It cannot wait to repeat

Q. That is what I mean—to verify? A. If there is any point that looks doubtful we do try to verify

it, and if anything is doubtful in our minds we leave 163
it out.

Q. What do you mean by doubtful in your mind? A. If we get a story that is contradictory, or which seems to be improbable.

Q. Right on the face of the story? A. Yes; which seems to be improbable; then we don't print it. The whole stability and character of a newspaper depends upon it.

By a Juror:

Q. Would not the reputation of a man like Mr. McDonald be known in the *World* office, and if it was said that the man had disappeared six months before, would not that seem improbable? A. He 164
might have disappeared before, but we trusted that our correspondents had investigated that and knew about it. We could not remember the disappearance of the man six months ago in Cincinnati.

By Plaintiff's Counsel:

Q. Take this page of the *World* which has been put in evidence here, and as to all these statements under the head lines here, there is never any verification of whether they are true or false before publication? A. I could not say that.

Q. The rule is that there is not? A. The correspondent is supposed and directed to verify every-
thing before he puts it on the wire. 165

The Court: That is not the question. He wants to know what is done in your office to find out how much authenticity there is to these items that you are publishing about people every day.

We trust to our correspondents. Our correspondents are instructed to verify the facts in all cases before sending them, and the only danger is the danger in transmission over the wire. Practically no inquiry is made. We act upon the dispatches as they are sent to us by our correspondent, unless they are improbable on their face. This has been the

166 course of business in the management of the defendant since I have been in its employ; as a matter of fact I find those dispatches accurate.

By Plaintiff's Counsel:

Q. You say you find them accurate. How do you find them accurate?

By Defendant's Counsel: Nobody complains of them.

Q. The only reason why you say you find them accurate is, as your counsel says, that in most cases people do not complain of them? A. In nine cases out of ten that we do investigate we find that our
167 facts are correct.

Q. And so you are willing to take the chances? In nine cases out of ten you are willing to take chances on the tenth? A. I was speaking figuratively; I mean in a great majority of cases. Newspaper men have got to be careful and accurate or they will lose their places. It is their livelihood—their accuracy.

Q. How many cases have arisen where investigation has been made as compared with the number of instances of such stories that the *World* prints from day to day; investigation by you, I mean, or by the *World?* A. I cannot answer that question intelligently, because we print hundreds of
168 stories every day and very few of them are questioned, extremely few, not one in a great while; but in the past seven years I have investigated a number of cases, and prior to this time a great many in the preceding ten years. I have searched for the original of this dispatch among my papers and have caused my stenographer to search; I have searched everywhere in the *World* building. I have been unable to find it. That search was made when Bowers & Sands said they had not received the document. That was sometime between nine months, I should suppose, and a year afterwards, after the letter was sent; that was the first question that

came up. That letter got safely to Platt & Bowers, 169
and I believe the enclosure did. I think Platt & Bowers lost it. I believe that they lost it, I am sure of it; there were other enclosures besides this particular one; but there was a lot of papers along with this original document, written by Mr. Garrison, and they have not even got a sheet of the paper with Mr. Garrison's report to me on, which I sent. They all went together. They all may have got there safely. I presume they were separated after they got there. I have not heard of any complaint as to any other papers being lost that were supposed to be in this letter except the papers bearing on the McDonald case. I don't think there were any other documents of record in those letters that would be liable 170
to come up to me. There has been no complaint. The information was sent not only with regard to the McDonald case, but with regard to a number of other cases.

Counsel for plaintiff thereupon admitted that diligent search has been made in the office of defendant's attorneys for that original dispatch, and that they have been unable to find it.

Defendant to maintain the issues on its part, thereupon called as a witness—

GEORGE H. USHER, who first being duly sworn, testified as follows:

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I am an assistant superintendent of the Postal Telegraph and Cable Company. The principal office of that company is 253 Broadway. We do business all through the United States. In August, 1892, the principal office was at 187 Broadway, but we were carrying on the telegraph business between all the largest cities of the United States. We carried on a press service at that time and had business connections with the *World* newspaper. We transmitted special dispatches from various points throughout the United States to the *World* newspaper. We had been doing that business prior to

172 August, 1892, with the *World*, to the best of my recollection, something like a year or more. That covered the transmission of dispatches delivered by representatives of the *World* to our company in Cincinnati, from that city to New York. That contract was in force on the 17th of August, 1892. At that time my company did transmit dispatches from various points in the United States, including Cincinnati, to the *World* newspaper at New York, to the best of my knowledge and belief. I had general charge of the accounts and knew about the business. Dispatches were delivered to the *World* at the City of New York in this manner: They were sent over the wire direct into the *World* office by
173 postal employees, by our employees, and received at the *World* office by employees in the service of our company. We sent our employees to the *World* office to receive these dispatches that came at that office; then they were delivered to the *World* as follows: The operator received them and handed them over to a boy or the telegraph editor, I don't know which—boy, presumably.

Q. Will you look at the paper marked Defendant's Exhibit No. 1, of May 17, 1895, and state whether you have ever seen it before? A. I don't recollect about this. I presume I saw it on the previous case. That is one of the ordinary blanks that was used by our employees in delivering these special dispatches
174 to the *World*. They were in the habit of typewriting them on the back of the blank.

Q. Didn't you produce this dispatch yourself at the last trial? A. I brought over the original dispatch in this case, I believe.

Q. The original that was delivered in Cincinnati? A. Yes, sir.

Q. Were you asked to produce upon the prior trial of this case a paper? A. I was

Q. Did you produce such a paper? A. I did.

Q. Will you look at the document now shown you, and tell me whether that is the paper you so produced? A. It is.

Q. From where did you obtain that paper? A. From Cincinnati. 175

Q. How did you happen to obtain that paper from Cincinnati? A. We received a request I think from——

Q. You gave instructions to your company there to forward it? A. That is it.

By Defendant's Counsel:

Q. Do you know what means were employed at the Cincinnati office in the ordinary course of business for the transmission of messages from that office to the New York *World* in this city; I mean the general arrangement of your wires and the general manner of conducting your business? A. A dispatch filed in Cincinnati addressed to the *World* would be put upon the wires leading direct into the *World* office and transmitted. 176

Q. And delivered? A. And delivered.

Q. Delivered to whom? A. To the *World*.

Q. Who would it be received by? Would it be received by your employees? A. Received by the postal employees in the *World* office.

Q. Was that the general course of business on the 17th of August, 1892? A. It was.

By the Court:

Q. As I understand it those employees sometimes at least took off the messages by typewriting? A. Yes, in most instances. 177

By Defendant's Counsel:

Q. Were your employees in New York and in Cincinnati at that time competent men?

The Court: We will assume that they are competent. We will assume that they were reasonably competent, and if they were not it was not your fault.

178 The witness then continued as follows:

That method of business had been carried on something like a year prior to August 17, 1892. Our company was in the habit of delivering to the *World* at the City of New York, in August, 1892, between 15,000 and 20,000 words per night. I believe that they also received dispatches under a similar arrangement with the Western Union. My company alone delivered some 15,000 to 20,000 words per night of special dispatches. We kept three or four men at the office of the *World* at that time to receive these dispatches. We had found that to be a satisfactory mode of conducting business so far as the correctness of the transmission of dispatches was
179 concerned.

CROSS-EXAMINATION:

On cross-examination by plaintiff's counsel, the witness testified as follows:

I do not know who our employees at that time were at the *World* office, who received dispatches. I have never sought to find out who they were. I do not remember of receiving any request from the *World* office to investigate the matter. They never asked me who my employees were on the night of the 17th of August, 1892, that received messages in the *World* office. That I know of they have never
180 sought to find out who the operators were at that time. Our operators did not have authority to leave out words or to put on head lines, or to change the meaning of dispatches by any means. Our operators were simply to receive what came to them over the wire and deliver it to the *World*. That is what they were paid for. I never saw the dispatch that was received at the office that night. I never saw any dispatch that was received there that night. I cannot state positively whether those dispatches were written out in long hand or were typewritten; we sent typewriter operators there for the reason that it was more desirable to have dispatches deliv-

ered in type. I cannot tell positively whether all 181
the operators there that night, the 17th of August, were typewriter operators.

Q. You don't know whether they were or not? A. I do not know who the operators were who were there.

REDIRECT-EXAMINATION:

On redirect-examination by defendant's counsel, the witness testified as follows:

Q. I may be in error, but do you not recall that we sent to you and urged careful inquiry as to who your operators were on the night of the 17th of August at the *World* office? A. I really don't re- 182
collect.

Q. Do you not recollect that when you testified on the trial you were asked that question as to whether you knew what their names were and whether we could find them? A. I recollect that I was asked if I would not undertake to find out who they were and I said I would. That is the question I referred to a moment ago.

Q. That question was asked at the last trial, was it? A. Yes.

Q. Did you find out? A. I did not.

Q. Did you ever send us any word? A. No, I thought the matter was dropped. I did not think of it after I left.

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By Plaintiff's Counsel:

Q. You have never been asked since? That is about a year and a half ago. You have never been asked since who they were? A. Not that I remember of.

Q. They were on your pay roll, were they not?

The Court: Suppose all those employees had been produced, it is not probable any one of them could remember about this particular dispatch one way or the other.

184 By Plaintiff's Counsel: But that I think is a part of our case.

To maintain the issue on its part, the defendant then recalled as a witness—

SOLOMON S. CARVALHO, who first being duly sworn, testified as follows:

By Defendant's Counsel:

Q. You were asked whether the firm of Bowers & Sands wrote you a letter on November 17, to which you replied on the 22d? A. Yes.

Q. I show you our press copy book and ask you
185 to look at a press copy of a letter and state whether you recognize it as the letter to which you refer (showing the witness the book)? A. I think so.

Counsel for defendant then read from this letter dated November 17, 1892, and addressed to S. S. Carvalho, Pulitzer Building, New York.

"We beg to refer you to our letter of November 4, 1892, addressed to Colonel Harvey. No answer has been received in reply thereto. We are quite in the dark as to the defense to be interposed in the action of McDonald *vs.* The Press Publishing Company, and therefore again ask for the information
186 set forth in said letter. We beg that you will have the matter attended to as it is of importance.

"Yours truly,

"PLATT & BOWERS."

The defendant to maintain the issues on its part then read in evidence from the deposition of DAVID S. TARBELL ON DIRECT EXAMINATION, as follows:

I am a newspaper man, and have been engaged in that business for about fifteen years. In August, 1892, I was doing work for several newspapers. I was connected with the Cincinnati *Post* and with

the New York *World*. For the latter I had been 187
correspondent in Cincinnati for three or four months at that time. Gosdorfer is a newspaper man of this city, and for two or three weeks about that time my newspaper work became too heavy for me to handle it all myself and I had him to look after some of it, among which was the "New York *World* Correspondence," and he sent dispatches to the *World* over my name. . .

Certain other portions of said deposition were read in evidence by counsel for the plaintiff and defendant, but were stricken out by the Court as appears below.

The following colloquy then took place: 188

The Court: I think I will strike out all the evidence of Mr. Tarbell except the fact that he was the correspondent of the *World* in Cincinnati and employed Gosdorfer to do his work. Strike out all the evidence that has been read. The jury will disregard it.

By Plaintiff's Counsel: Will you mention what part of the deposition is left?

The Court: Simply the fact that he was correspondent, and the fact that he had temporarily employed Gosdorfer to act in his place.

By Defendant's Counsel: There are one or two questions I shall ask liberty to read on the re-direct. 189

By Plaintiff's Counsel: Just a moment. I might hand up this to your Honor. You can simply indicate what parts you wish left.

By Defendant's Counsel: I am satisfied to take his Honor's statement that the only evidence that shall be received from this witness is what his Honor said. I do not take any exception to the ruling that was made, and then you have your record perfectly clear. There are two more questions that I am going to ask to read on the re-direct.

The Court: You want to read the question in re-

190 gard to Mr. Gosdorfer's qualification as a newspaper man?

By Defendant's Counsel: Yes, sir.

The Court: Do you object?

By Plaintiff's Counsel: No, sir.

Defendant's Counsel then read the portion referred to, as follows:

"I had known Mr. Gosdorfer at that time a year and a half, I believe, or more.

"Q. Please state from your knowledge of Mr. Gosdorfer what degree of skill and care he exercised in the practice of his profession generally? A. I considered him one of the best newspaper men in the city, for the reason he was a good news gath-
191 erer and was accurate. These are the two principal reasons."

Mr. Bowers: I suppose with the exception of the three questions that have just been read, and the answers, the Court excludes all the evidence of this witness, direct and cross, except the evidence showing that he was the correspondent of the *World* in Cincinnati and has employed Mr. Gosdorfer. I think that is what your Honor said.

Mr. Deming: And was a space writer on a Cincinnati newspaper.

The Court: Yes.

The defendant to maintain the issues on its part
192 then call as a witness:

MILTON GOSDORFER, who first being duly sworn, testified as follows:

My name is Milton Gosdorfer. I am a newpaper writer. I have been engaged in such business for the past seven years with the exception of one year. I reside in Cincinnati, Ohio. I was residing in Cincinnati, Ohio, in the month of August, 1892. My business at that time was that of newspaper writer.

Q. Did you have any connection with the *New*

York World newspaper at that time? A. I did, through the medium of Mr. Tarbell. 193

Q. Mr. David S. Tarbell? A. Yes, sir.

Q. Who was Mr. David S. Tarbell? A. Mr. Tarbell was connected with the *Cincinnati Post* at that time, and is still. He represented the *World* as its correspondent in Cincinnati. I came into connection with the *World* through him. He came to me and asked me to do certain work for the *World*, to wire to the *World* each day such local news as was of sufficient importance. That was several weeks, possibly a month or two before the 17th of August, 1892. I was to receive the money which the *World* sent in payment for the matter sent to it, as my compensation. 194

Q. And that was so much for every article that was used, or what was the arrangement? A. It was a certain rate per column.

Q. I don't quite understand. A certain rate per column? You were to get all that he would have gotten if he had sent the dispatch himself; is that it? A. Yes.

Q. Were you paid irrespective of the fact whether your dispatches were used or not? A. No, the payment was according to the amount used in the paper.

Q. That is, you might send ten columns and if they used one they would only pay you for one; is that right? A. That is correct. This arrangement continued quite a while during that year. I don't know the length of time. 195

Q. What was your business at the time that Mr. Tarbell employed you? A. I was a writer on the staff of the *Post*. I had been on the *Post* since July, 1888, as a reporter or writer. I had not been in the newspaper business before that. My newspaper experience commenced in 1888. I knew him, Mr. Tarbell, ever since he came on the staff of the *Post*, which was, I think, more than a year previous to the time we made the arrangement about the *World* correspondence. I re-

196 member sending dispatches to the *World* on the 17th of August, 1892. I sent such dispatches from the office of the Postal Telegraph Company, in the City of Cincinnati.

Q. Will you look at the paper that I now show you, which, with permission of counsel, I will say is the paper identified yesterday by Mr. Usher, and state to the jury if you ever saw that paper before? A. Yes, sir.

Q. When did you see it first? A. On August 17, 1892; it is in my handwriting. It is signed with the name of D. S. Tarbell. I was authorized by him to sign his name to all matter which I sent to the *World*. At that time I considered it necessary, in
197 order to secure consideration for an article, that it should be signed by the name of the recognized correspondent in Cincinnati; I was so informed. I was told by Mr. Tarbell to sign his name. Mr. Tarbell handed me a set of printed rules gotten up by the *World* for the guidance of its correspondents.

Q. Will you tell me whether those first five rules that I show you upon that page were among them (showing witness set of rules)? A. Yes, sir.

Counsel for defendant read in evidence, under the heading "Instructions—what to send," the following:

"1. Facts—and nothing else. Both sides of every
198 story. Absolute accuracy and absolute fairness are prime essentials of work for the *World*.

"2. The *World* aims to interest, inform and entertain not any special class, section, party or kind of people, but the great mass of the general public. Whatever facts are calculated to interest, inform or please everybody everywhere are good news.

"3. A fact which may be of vital importance in any particular locality may be insignificant for the average reader. Imagine yourself a stranger, set down in the locality which you represent, and judge from that what occurrences are of interest to other strangers all over the country.

"4. Put into your story only those facts which 199
are of interest to every one. Don't waste space by writing in the story matter to suit or please the person who gives you the information or others having a direct personal interest in the matter.

"5. Events involving New York people or interests have a value in addition to their ordinary news interest, which justifies more of a story than would otherwise be sent."

After I read that dispatch, I carried it to the office of the Postal Telegraph Company and handed it to some person in charge there. I handed it to them to be filed, to be placed on the wires. I had been in the habit of doing that for some time be- 200
fore; each day I had either brought or sent matter to the Postal Telegraph office. I left this paper there which I have just identified for the purpose of having it transmitted to the *World*. There are two dispatches upon this paper; one relating to another matter and the other bearing upon Mr. Evan Smith.

By Defendant's Counsel: Defendant's counsel offered the part of the dispatch relating to Mr. Evan Smith in evidence, which was received, marked Defendant's Exhibit 3, and defendant's counsel then read it:

201

Defendant's Exhibit No. 3.

"Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio Manager of the Standard Oil Co., until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a sanitarium here.

"D. S. TARBELL."

202 CROSS-EXAMINATION:

On cross-examination by plaintiff's counsel, the witness testified as follows:

In August, 1892, I was a newspaper reporter; went on the *Evening Post* in 1888. I was about sixteen or seventeen years old in 1888. In 1892 I was twenty. I did not know Mr. Evan Smith. I knew who he was at the time I sent this dispatch.

Plaintiff's counsel then put the following question:

Q. How did you know who he was?

To which question counsel for defendant ob-
203 jected.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as follows:

A. I knew it from the matter that arose at this time about his having gone away.

The witness then continued as follows:

A. I did not know him.

Q. The matter that arose at this time; what do you mean by matter arising? A. I speak of this
204 statement.

Q. What statement? A. The statement published in the Cincinnati newspapers.

Counsel for plaintiff then put the following question:

Q. Then you got your facts from another newspaper?

To which question counsel for defendant objected to as incompetent and irrelevant.

The Court overruled the objection and admitted the evidence, to which ruling the defend-

ant duly excepted, which exception was duly noted and allowed. 205

To which question the witness answered as follows:

A. Yes.

The witness then continued as follows:

I have no personal knowledge regarding Mr. Smith's affairs. I knew that he was a brother-in-law of Alexander McDonald only from the statement. I did not know it. I did not know from my personal knowledge that Mr. Evan Smith had strangely disappeared six months before. I did not know from my personal knowledge he had been located living in luxury anywhere. I gained my 206
knowledge from the account in the Cincinnati *Post;* I had no other knowledge, except what I saw in the newspaper. I made no personal investigation at all before sending this dispatch.

Q. I call your attention to the fact that in this dispatch which you say you filed, you put in "McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a sanitarium here." A. I gained the statement from the newspaper account. I lengthened the dispatch and added, "McDonald claims that Smith's accounts are straight, but that he is insane," as a matter of fact for the same reason that I stated any of the other facts; I believe it was material to the story. I 207
simply put it in because I thought it was news and a part of the story.

Q. News that he was insane? A. Yes, sir. I have been a newspaper man since 1888, with the exception of one year. I am now twenty-three.

Q. Now with that age, and with the experience that you have had, and acting under the instructions to send nothing but good news to New York, will you explain for the benefit of the Court and jury, who are not newspaper men, what there was about an item that a man had strangely disappeared, had become insane and was being brought

208 to a sanitarium, that should make it important to telegraph from Cincinnati to New York; as a newspaper man explain that? A. Mr. Smith seemed to be a man of some prominence. I considered it news, as I would consider any other happening of the kind to any one else, of any prominence whatever, news. It was news to be telegraphed to New York, because Mr. Smith was a man of some prominence, probably well known, and an occurrence of that kind to him would be read with interest by a great many people; therefore I considered it news and therefore I sent it. I did not absolutely know he was a man of prominence. I did not know what he was, except what the newspaper said; that is
209 all.

Q. Now let me ask you whether that dispatch, without these words in it, would have been, in your opinion, news to telegraph from Cincinnati to New York. Omitting the words "who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio Manager of the Standard Oil Company"; omit that and simply send this to New York in regard to Evan Smith: "Evan Smith strangely disappeared six months ago, and has been located living in luxury at Bellmore, a town near Windsor, Canada. It is claimed that his accounts are straight, but that he is insane and he is to be brought to a sanitarium"? A. Without the clause
210 which you state the matter would not be complete as a news story, because it would not identify him and would not state to those who did not know him whther he was a person of any importance or not; but the fact that he held a responsible position would seem to indicate that he was of more or less importance.

Q. Now, if, as a matter of fact, therefore, Mr. Smith was not the confidential man for his brother-in-law; if Mr. Alexander McDonald was not his brother-in-law at all; if Mr. Smith had not strangely disappeared six months before; if he—well, stop at that point; what becomes of your accuracy in send-

ing news? Now, as an experienced newspaper man, 211
tell us how you manage to do those things? A. Your question is rather confusing. I have lost the drift of it.

Q. (Repeated)? A. Why, if all those things were not true I should evidently be somewhat astray as regards facts.

Q. What would become of the importance of your dispatch as a matter of news? A. I think its importance would be diminished.

Q. How much of it would be left? A. How much of it would be left—is that the question?

Q. What would be left of its importance as news? The dispatch not being true, is it still important news to send? A. If it is not true it is not important 212
news. News is presumed to be true. It was my duty to investigate or depend upon the investigation of some one else that I felt was absolutely reliable before sending such statements. I depended upon a statement in a newspaper which I felt was absolutely reliable.

Q. Now it has been admitted here that these statements are untrue in this dispatch which I have referred to; that has been admitted here openly on the trial.

The following colloquy then took place:

By Defendant's Counsel: What has been admitted openly on the trial?

By Plaintiff's Counsel: That Evan Smith is not 213
the brother-in-law has been admitted.

By Defendant's Counsel: I think that is correct. He is not the brother-in-law; there is no doubt of that. We have not admitted that all those matters are not true concerning Mr. Smith. We admit that he is not the brother-in-law of Mr. McDonald.

By Plaintiff's Counsel: Will you not admit that he did not strangely disappear six months before?

By Defendant's Counsel: Certainly not. I don't know anything about it.

By Plaintiff's Counsel: We will prove that later.

Last question withdrawn.

214 The witness then continued as follows:

I have lived in Cincinnati all my life; that has been my residence. I have been away from there numbers of times.

Q. You have been a newspaper man there ever since 1888, except one year? A. Yes, sir.

Q. As such reporter it was a part of your stock in trade to know pretty well the prominent people of the city, was it not? A. Oh, yes.

Q. And people not so prominent; to have a wide acquaintance? A. Yes. I did not know Mr. Smith. I knew Mr. McDonald slightly. I knew who he was. Knew what his business was. I did not call on him and ask him in regard to this Mr. Evan
215 Smith whom I said was his brother-in-law, because I did not consider it necessary.

Counsel for plaintiff then put the following question:

Q. Did you know at the time that you sent that dispatch that this Mr. Evan Smith had a family?

To which question counsel for defendant objected on the ground that it was incompetent, immaterial and irrelevant.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.
216

To which question the witness answered as follows:

A. I don't recall exactly. I don't think I did know.

By the Court:

Q. You did not know whether he had or not? A. I don't think I did know whether he had a family or not.

By Plaintiff's Counsel: 217

Q. Did you know that at this time, when Mr. Evan Smith suddenly became insane, his family were in great distress on account of it? A. I knew afterwards. I don't think I knew at that time.

Q. You did not take any pains to inquire in regard to the circumstances?

The Court: Well, he said that. He sent what he saw in some other newspaper.

Q. Do you remember, in this newspaper to which you said you referred for your facts, that there was any statement to the effect that this Mr. Evan Smith was the confidential man of his brother-in- 218
law, McDonald? A. I believe that the statement was that Mr. Smith was confidential bookkeeper for the Standard Oil Company or for McDonald, or something of that kind.

Q. Don't you know, as matter of fact—just refresh your recollection; you have been examined on this before, at the last trial—— A. Yes, I am trying to recall it.

Q. Don't you know, as a matter of fact, that the statement in this newspaper, to which you referred, was simply that he was the confidential man and bookkeeper of the Consolidated Tank Line Company and the Standard Oil Company? A. I am not absolutely sure about that, but I think it was.

Q. I will read a question and answer from your 219
examination:

"Q. From 'confidential bookkeeper of the Standard Oil Company' you made it 'confidential man for his brother-in-law, McDonald'? A. Yes, sir."

Q. You did so testify? A. I believe I did.

Q. And that is true? A. To the best of my recollection that is true.

220 REDIRECT-EXAMINATION:

On redirect-examination by defendant's counsel, the witness testified as follows:

The article that was published in the *Post* was as follows:

"Evan Smith, who for many years was the confidential man and bookkeeper of the Consolidated Tank Line Company and the Standard Oil Company, in Cincinnati, disappeared very suddenly last April.

"Smith is the brother-in-law of Alexander McDonald, the millionaire, who controls enough of the stock of both companies to keep him as the South-
221 ern Ohio head of the two concerns."

See whether that is not the article, which I just read to you, and whether I have not read the first part of it correctly? A. There was a statement in the article that he was the brother-in-law of Mr. McDonald. I had been employed by the *Post* since 1888; I had been on the *Post* from 1888 to 1892, when this dispatch was sent.

Q. What knowledge had you of the management of the business of that department—I mean as to gathering the news and the accuracy of its corps of reporters? A. I was very conversant with the method and the men, and I had reason to believe that the newspaper was accurate.

222 Q. What reason had you to believe that the newspaper was accurate—from your experience, or what? A. From my own experience and from my observations. I had been on the paper for four years. My experience had been such as to lead me to form an opinion as to the accuracy with which news was gathered for publication. I believed the statement published in the *Post* to be true. The article I have referred to as published in the *Evening Post*, and from which I obtained the information on which I based my dispatch to the *World*, was further as follows:

"Expert bookkeepers were put at work after 223
night investigating his accounts. They found everything straight, and this fact baffled further efforts until about ten days ago.

"Then, through the the police agencies, Smith was located, and it was found he was living a luxurious life with plenty of money at Bellmore, a little town some twenty-five miles east of Windsor, Canada.

"The word was sent to arrest Smith and bring him home. He is expected here Thursday night. Mr. McDonald will not communicate why Smith is so suddenly called back.

"He is very reticent and says that his arrest and
return does not concern any one except the immedi- 224
ate relatives.

"Every one at the general office of the Standard Oil Company stoutly maintains that there is no crookedness in Smith's accounts.

"Mr. McDonald would not say whether there was a shortage, or whether there was some outside transactions that led to Smith's peculiar actions. The whole affair seems clouded in mystery, so far.

"From another source it is learned that the intention is to place Smith in a sanitarium upon his arrival in Cincinnati, as it is said he has lost almost his reason, and while living in such an out of the way place imagined he was poor at times, and then again would spend money lavishly." 225

RECROSS-EXAMINATION:

On recross-examination by plaintiff's counsel, the witness testified as follows:

Q. You have heard this full article now and it has refreshed your recollection somewhat, has it not? A. Yes.

226 The defendant, to maintain the issues on its part, then called as a witness—

RICHARD A. FARRELLY, who, first being duly sworn, testified as follows:

By occupation I am a newspaper man. I am employed at the present time by the *New York World* I am now in charge of the *Evening World*. In 1892 I was assistant managing editor of the morning edition of the *World;* that was true of the month of August, 1892. I had been connected with the *World* in 1892, for about thirteen or fourteen years. I had no other newspaper experience than that
227 which I gained in the *World* in those thirteen or fourteen years.

Q. What were your duties in August, 1892? A. It would take a long time to tell what my duties were in August, 1892; generally I was in charge in the daytime; took care of all routine matters, all the telegraphic news, and news of general interest outside of New York City news. I ordered news generally throughout the country, except for matters of great importance, where it would be four or five thousand words; I would not do that without consulting the managing editor. If he were not coming down in time to do it, however, I would do it myself. I know what was the course of business
228 at the *World* office in August, 1892, as to the reception of special despatches from out-of-town correspondents. They were sent by the two telegraph companies, the Postal and the Western Union, either sent to the office by messenger boys or else over the wires into the office. The Postal Telegraph Company had wires at the World Building where they received night dispatches for the use of the *World* in August, 1892. I remember the form of the blank on which they delivered their dispatches at that time to the *World*. I should think that the paper marked in this case Defendant's Exhibit 1, May 27, 1895, is the same form of blank that was used in

August, 1892; that was the form of blank. They 229
were in the habit of putting the dispatch in type on the back. I remember that some time in the autumn of 1892 I was requested by Mr. Carvalho to look for the original dispatch, which had been delivered to the *World* in New York from the Postal Telegraph Company, bearing upon Mr. Alexander McDonald. I had search made for such a dispatch. I had the search made by Mr. Garrison. Mr. Garrison was my assistant or clerk or stenographer. I don't believe he was a stenographer; he was a clerk really. He brought the original of the dispatch and the papers in reference to Mr. McDonald. It was on a telegraph blank like that—similar to that; the dispatch was written in type on the back, type-writ- 230
ten on the back. I read it. I had at that time in my possession the original publication as it had appeared in the *World*, I think on the 18th of August, which is complained of in this action. I compared the dispatch which was handed to me with the publication that was made in the *World;* I found that they were identical; they were the same.

Q. That is, you found that the dispatch that had been delivered by the Postal Telegraph Company to the *World* was the same as the publication made in the *World?* A. Yes, sir.

Q. Then the name of Evan Smith was not in that dispatch? A. It was not.

Q. Did you compare them or did you simply read 231
them both? I mean did you have anybody assist you in comparing them or did you simply read them? A. I don't know about that. I have a general recollection that I made a comparison. Whether another person read it or not I do not recollect.

Q. Were you looking at that to find out whether there had been any error in the publication? A. That was my purpose.

Q. And you found that there had not been? A. I found that they were identical.

Q. Therefore you found that there had been no error; that is, there had been no error in your de-

partment in publishing the dispatch? A. No, I was satisfied of that.

Q. What did you do with the original dispatch? A. It was sent to Mr. Carvalho.

Q. Did you send it to him? A. I think I did. I don't recollect thoroughly. I know it was sent to him.

Q. Let me see if I can refresh your memory, "I sent the original dispatch down to Mr. Carvalho and have never seen it since." Is that right? A. I think that is right.

Q. On the prior trial you testified it did not contain the name of Evan Smith; it did not contain the statement, "McDonald claims that Smith's accounts were straight, but that he was insane and would be taken to a sanitarium." Is that right? A. That is correct.

Q. Was the dispatch directed to McDonald, the plaintiff in this action; that is to say, did it describe him and him alone? A. It did.

CROSS-EXAMINATION:

On cross-examination by plaintiff's counsel, the witness testified as follows:

Q. Your counsel had been good enough to refresh your recollection by referring to your testimony on the previous trial. I think it will shorten your examination if I read you half a dozen questions and answers from the previous trial. You were asked the following questions, and you gave the following answers, a year or a year and a half ago:

Counsel for plaintiff then read testimony of witness on former trial:

"Q. Was there a heading on that dispatch? A. I think there was; yes.

"Q. Who put it there, if you can tell? A. I could not tell you.

"Q. Was the heading put there by the newspaper

office, or did it seem to be in the same handwriting as the rest of the dispatch? A. I could not tell you that. 235

"Q. You looked at the dispatch to compare it? Tell us whether that heading was in the same handwriting that the dispatch was? A. The dispatch was not in writing; it was typewritten.

"Q. And was the heading typewritten? A. I could not tell you.

"Q. Was there any scratches or marks of elimination about that dispatch? A. No, sir.

"Q. Nothing scratched out at all? A. No, sir; it was just plain.

"Q. You don't know whether the heading was typewritten or not? A. No; I do not. I was going to say that I thought it was written, but I could not say. 236

"Q. Did you know Mr. McDonald then? A. No, sir; I never heard of him.

"Q. Had you ever heard of Evan Smith? A. No, sir.

"Q. Did you know there was such a man? A. No, sir.

"Q. How can you say now then that you found the name of McDonald, but not the name of Smith, in the dispatch? A. Because my recollection of the original dispatch brought to me was that it was exactly the same as it was in the paper.

"Q. All you remember generally is then, that it was the same as it was in the paper? A. In the dispatch it was identical, or almost identical, with the paper. 237

"Q. You have not the paper there? A. I did not compare it at that moment.

"Q. When had you read it in the paper? A. I don't remember that I did read it in the paper.

"Q. How do you know it was in the paper? A. Because inquiries had been made about this dispatch by Mr. Carvalho, either by letter or to me personally, and he directed me or requested me——

"Q. Inquiries had been made, but you don't know

238 that you even read it in the paper at all? A. I remember I read that dispatch.

"Q. I thought you said a moment ago, 'I don't know that I read it in the paper.' Did you say that? A. I did say that; yes."

Q. Did you give these answers to those questions? A. Yes, sir.

Q. Do you wish to make any corrections in them now? A. I remember that you confused me a good deal at the time. My understanding of one question you asked there, I think the first question you asked, "Did you read it in the paper?" or "Had you read it in the paper?"--the first question of that kind; at that time I thought you referred or wished to know
239 whether I had read the dispatch in the paper prior to the time I was asked to make the comparison, whether I had a general recollection of having read that item of news with the many other items.

Q. Is that the only correction you desire to make? A. I think that is all.

To Defendant's Counsel:

I did read the article that was published in the *World* at the time I looked it over in connection with the original dispatch.

By the Court:

240 Q. After this dispatch had been put in typewriting by the operator of the Postal Company in the *World* office according to the usual course of business, what would next have been done with it? A. It would have gone to a telegraph editor. There were many telegraph editors at the time. I think the man in charge of that was named Lewis, if I recollect right. In the ordinary course of business it would have gone to Mr. Lewis--in the ordinary course of business. I think Mr. Lewis is out in Denver. His health failed him a year or two ago. Then, according to the usual course of business, Mr. Lewis would have passed it over to a telegraph editor. Mr. Lewis

would not have determined whether it would be in- 241
serted in the paper or not; he would hand it over to an editor to read and determine whether it should be published, to edit, to correct and to put it in shape for publication. It would then be handed back to Mr. Lewis and he would send it upstairs. It would be put in type, the type would be read by——

Q. We understand that part. A. But many things that go in type are not published. The night editor would have ultimately determined whether a dispatch of this sort should be published or not. I think Mr. Chamberlain was night editor at that time.

By Plaintiff's Counsel:

Q. If I understand you right, you wish us to un- 242
derstand that this dispatch that you saw was without any erasure or any interlineation or marks of any kind; just a plain, straight piece of typewriting? A. Yes, sir.

By Defendant's Counsel:

Q. There had been a heading put on; had there not? A. Yes; there was a heading on it.

The defendant, to maintain the issues on its part, then called as a witness—

ERNEST O. CHAMBERLAIN, who, first being duly sworn, testified as follows:

243

I am in the employment of the Press Publishing Company, and was in August, 1892; I was an assistant managing editor in 1892. As assistant managing editor I was in charge of the paper during the absence of the managing editor. I had held that position at that time probably a year; I forget the exact date. I had to do with the employment of correspondents for the *World* in different parts of the country, under the managing editor's direction; it was generally in my hands. I had authority to employ correspondents in different parts of the country; I selected the men and recommended them. It

244 was a matter of form that the managing editor should appoint them; they were appointed in his name. I say it was my duty to select the men, recommend them to the managing editor, and the appointments went through the form of being made by him. He knew nothing about it personally. Practically the matter was in my hands, and had been for a year. I know who the correspondent in Cincinnati of the *World* was in August, 1892; the principal correspondent at that time was Mr. David S. Tarbell. He had been employed as such correspondent for some time; I cannot give the date. He was employed through me.

Q. What did you know about Mr. Tarbell at the
245 time you employed him? A. He was recommended. When I wanted a correspondent at Cincinnati, I knew personally Mr. Claude Meeker——

The Court; You need not go into details.

The Witness: He was recommended to me by Mr. Claude Meeker, who had been a well known newspaper man in Cincinnati for a good many years, and who was at that time private secretary of Governor Campbell, of Ohio. It was on that recommendation, and I afterwards made inquiry about him from Cincinnati newspaper men and others, and was satisfied that he was reliable. I satisfied myself that he was a competent, trustworthy man. The rule or re-
246 quirement of the paper is that these special dispatches must bear the signature of the correspondent at Cincinnati; every dispatch must be signed, if they are not signed by the correspondent the paper will not publish them; not a dispatch from Cincinnati. If it was a dispatch from some foreign point we might; from a point where we have a regular correspondent we require his signature. Our correspondents have, however, authority to employ men to do their work; if they do, it is at their own risk. They are supposed to notify us of any such change; their instructions say they must notify us of any absence for longer than a day. In August,

1892, I did not know that Mr. Tarbell had employed 247
some one to send dispatches in his name. At that time I supposed that the dispatches that came from Cincinnati bearing his name were sent by him. He may have employed some one to take them to the office, but he was responsible for them; they were sent by him, and we looked to him for any explanation if there was anything wrong. I believed that he was doing the work.

CROSS-EXAMINATION:

On CROSS EXAMINATION by Plaintiff's Counsel, the witness testified as follows:

Q. Do you mean to have us understand that Mr. 248
Tarbell had no authority to employ a substitute? A.. He had the authority; yes, if it were necessary. He was required to employ a substitute if it was necessary, but if he were going away from the city for a week it was his business to notify us that he had employed such a person as a substitute, so that we would know who was doing the work.

Q. Do you mean to have us understand that Mr. Tarbell had broken some of your rules in Cincinnati at this time? A. I have no knowledge that he had. I know nothing about it. So far as I know, he was following the rules.

[DEFENDANT RESTED.] 249

To maintain the issues on his part, the plaintiff recalled, as a witness——

ALEXANDER MCDONALD, who testified in his own behalf, as follows:

I was in Cincinnati on the 17th of August, 1892. I heard the articles read by Defendant's Counsel from the Cincinnati *Evening Post*, headed: "In Canada. Evan Smith, of the Standard Oil Company, is located by Alexander McDonald, his brother-

250 in-law." I was acquainted with Mr. Evan Smith; he was not my brother-in-law; he was not any relative of mine.

The Court: I shall allow them to prove that the article was false.

By Plaintiff's Counsel: I propose to prove that the dispatch which they claim they sent was itself false.

The Court: I think you are entitled to it.

Mr. Evan Smith was not my confidential man.

Plaintiff's Counsel then put the following question:

Q. What was Mr. Evan Smith's business, if you know?

251 To which Defendant's Counsel objected as incompetent, irrelevant and immaterial to these issues, and as to bringing into this trial a question other than that which is set forth in the complaint.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as follows:

A. He was one of the traveling auditors of the Standard Oil Company of Kentucky.

252 Q. Here is the dispatch claimed to have been sent from Cincinnati: "Evan Smith, who was confidential man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio Manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a sanitarium here." The dispatch is dated in Cincinnati, August 17, 1892. I now ask you whether Mr. Evan Smith strangely disappeared six months before this dispatch was dated?

Defendant's Counsel objected to evidence 253
being re-received to contradict the dispatch that was delivered to Cincinnati, on the ground that the only question to be tried here is the wrong, if any, by the publication that was made by the *World* in New York, and that we are not put upon trial in this case upon the dispatch that was sent and not published; and the evidence in incompetent, irrelevant and immaterial.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as fol- 254
lows:

A. No, sir.

The witness then continued as follows:

He was not my brother-in-law; he was not my confidential man, and his position was traveling auditor.

Q. Had he anything to do with the accounts in the sense used here, "Smith's accounts are straight"? A. He investigated the accounts of others.

Q. Was he located living in luxury at Bellmore? A. I think not, sir.

Q. Did you ever claim that his accounts were 255
straight, as stated in this article? A. No, sir. I never was asked the question.

CROSS-EXAMINATION:

Q. Were you with Mr. Smith when he disappeared? A. No, sir.

Q. What do you know about it personally—anything whatever? A. I saw the telegram sent by Mrs. Smith to Cincinnati.

Q. With the exception of the fact that he disappeared and that Mrs. Smith sent that telegram, had

256 you any knowledge whatever yourself as to whether or not he had disappeared? A. I knew that he did not disappear.

Q. Had you any knowledge at all as to where he was or what he was doing, excepting what you heard from other persons? A. I knew where he was going, because he told me before he left. It was necessary for him to do so in order to have leave of absence.

Q. Then, perhaps, Mr. Smith did not disappear at all?

The Court: He says he did not.

A. He did not disappear until he disappeared from
257 the hotel one night—got away from his family.

Q. He did disappear from the hotel and run away from his family? Now you were not there? A. No, sir.

Q. You have no personal knowledge of that fact?

The Court: No, he don't know anything more about it than the newspaper did.

By Defendant's Counsel: Do I understand that all this evidence as to Mr. Smith is to be stricken from the record?

The Court: All that he gives is from hearsay.

By Defendant's Counsel: It is impossible to say what part of it is hearsay.

The Court: You may strike it all out except the
258 fact that he did not strangely disappear, and that he went off with leave of absence. Those are facts that you know?

The Witness: Yes.

The Court: You only know from information which you believe to be true?

By Defendant's Counsel:

Q. Did you say he was not in your confidential employment? A. He was not in my confidential employment.

Q. Not to any extent? A. The position of auditor——

Q. Just answer my question, please? Was he to any extent in your confidential employment? A. No, sir. 259

Q. Do you recollect testifying on the last trial, "In a measure he was in my personal confidential employment?" A. That is what I wanted to say now if you would let me.

Q. Then say it please? A. He was to the extent that I was president of the company and had employed Mr. Smith to examine accounts of different agencies as to their correctness.

Q. Then he was in your confidential employment to the extent of examining the accounts of different agencies of the Standard Oil Corporation? A. Yes, sir. 260

Q. Was not that rather a confidential employment? A. It was a position requiring a man of strict integrity. You may regard it as confidential.

Q. Will you tell me any employment that you consider more confidential than to send a man to examine accounts of others? A. Yes, sir.

Q. Please do so? A. The man who handles the money.

Q. That is very funny; but you recollect that you testified upon the last trial, if this record is correct, that he handled money? A. No, sir.

Q. Let me read to you from this record which has been read from so much. Some of these things are very funny: "In a measure he was in my personal confidential employment. He was the traveling auditor whose business it was to go around to these different interests and see that everything is right, and, of course, his position was rather a confidential one. He handled no money." Is that right? A. yes, sir. 261

Q. Now, you consider the position of handling money more confidential than the examination of the accounts; is that it? A. Yes, I regard that as the most important position we have.

Q. Still, what have you to say as to the employ-

262 ment of Mr. Smith——? A. I was speaking there as president of a company, not as an individual.

Q. Do you remember testifying on the last trial as follows:

"Q. Do you know a gentleman named F. E. Powell?" A. Yes, sir; I do.

"Q. In whose employ is he? A. He is one of our men of the Standard Oil Company, of Kentucky.

"Q. A man in whom you have confidence? A. Yes, sir.

"Q. And in whose statement you have confidence? A. Yes, sir.

"Q. I will read you from a copy of his deposition: 'After he left here with his wife and children he
263 was irritable and excited, but Mrs. Smith noticed nothing specially out of the way till she reached Detroit. There she had a great deal of difficulty to get him on the cars to go to Toronto, but she finally prevailed on him to leave Detroit, which he seemed loath to do, and he went on with her. At Toronto they stayed at the Queen's Hotel, and while they were there he went up to Coburg for a day or two. It was while in Toronto that he exhibited signs of insanity, and he disappeared there one day about August 12th and was found in jail. The reason for his being in jail was, he hired a horse and buggy, and the horse and buggy ran into another vehicle, and as he had no money to put up for bail to appear
264 in court for the damage he was jailed till Mrs. Smith could get the money to get him out, which was forthcoming the next morning. She then started home with him, and at Niagara Falls he wandered away, apparently accidentally, by getting on the wrong train. There was no reason for it except that he got on the wrong train, and it took him to a little town called St. Catharines. Mrs. Smith wired to her brother here, and as he was not in the city I got the dispatch and went to St. Catharines and located and brought him home.'"

Is that substantially correct? A. I don't know I imagine it is.

Q. Did you testify on the last trial that that was substantially a correct statement of what occurred? A. It was correct as it was told to me. That is all the knowledge I have of it. 265

Counsel for Plaintiff read in evidence portions of the deposition of F. E. POWELL, as follows:

I reside in Cincinnati, Ohio. I know Mr. Evan Smith. I have known him about seven years. St. Catharines is about twenty-five miles from Niagara Falls on the Canada side. I went to St. Catharines and found Mr. Smith and brought him home. I found him in the hotel in St. Catharines.

The following colloquy then took place. 266

Defendant's counsel objected again to evidence being received affecting Mr. Smith as incompetent, irrelevant, and immaterial, and as irrelevant to the issues and as bringing into this trial a question other than that which is set forth in the complaint and on the ground that the only matter to be inquired of here is the article that was actually published and not the dispatch which was delivered at Cincinnati.

The Court: This dispatch says he was found living in luxury. It is competent to show whether this was true.

By Defendant's Counsel: This dispatch that was published says that Mr. McDonald was. I don't want another accident to happen by your Honor saying that you only let the evidence in because I don't object. 267

The Court: You have just introduced in evidence the history of the disappearance.

By Defendant's Counsel: I was forced to by your Honor having so stated.

The Court: I struck it out.

By Defendant's Counsel. You struck out what was hearsay.

The Court: Yes.

268 By Defendant's Counsel: When the record gets in that shape I don't know where we stand and therefore I say what I do.

The Court: I allow this evidence and give you an exception.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

By Plaintiff's Counsel: I will omit that part of Mr. Powell's testimony which was kindly read by Mr. Bowers, and I will read this:

269 Plaintiff's counsel then read from the deposition of FRANK E. POWELL as follows:

I found him in the hotel. I could give you the name of the hotel, if I had my note book. He was just coming from his room. There was no one with him. I am not any relation to Mr. Smith or to Mrs. Smith.

Plaintiff's counsel read from the cross-examination as follows:

Mr. Smith is not any relation to Alexander McDonald that I know of. He was not an employee of Mr. McDonald.

270 Plaintiff's counsel then read from the deposition of F. E. POWELL the following question:

Q. Had Mr. Smith disappeared six months prior to the time you met him in Canada?

Defendant's counsel objected again to evidence being received bearing upon the matters affecting Mr. Smith, and to said question as incompetent, irrelevant and immaterial, and as irrelevant to these issues, and as bringing into this trial a question other than that which is set forth in the complaint, and on the ground

that the only matter to be inquired of here is 271
the article that was actually published, and not the dispatch which was delivered at Cincinnati.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

Counsel for plaintiff then read the answer of said witness as follows:

A. He had not.

The Court: I don't know whether he is speaking from personal knowledge. Do you object because it is hearsay?

By Defendant's Counsel: No; I do not object on 272
the ground that it is hearsay.

The Court: The preliminary facts in the deposition have not been read. I supposed Mr. Powell had some relation to the Standard Oil Company.

By Plaintiff's Counsel: That has been testified to by Mr. McDonald that he was a co-employee, and I omit it here for the sake of brevity.

Plaintiff's counsel then read the following question:

"Q. Was there anything strange about his appearance here? Did he not leave here simply on an ordinary summer excursion with his family for the purpose of getting rest?" 273

Defendant's counsel objected again to evidence being received bearing upon the matters affecting Mr. Smith as incompetent, irrelevant and immaterial, and as irrelevant to the issues, and as bringing into this trial a question other than that which is set forth in the complaint, and on the ground that the only matter to be inquired of here is the article that was actually published, and not the dispatch which was delivered at Cincinnati.

274 The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

Plaintiff's counsel then read the answer of witness as follows:

"A. That is the way we all understood it."

Plaintiff's counsel then read the following question:

"There was nothing secret about his leaving?

275 Defendant's counsel objected again to evidence being received bearing upon the matters affecting Mr. Smith as incompetent, irrelevant and immaterial, and as irrelevant to the issues, and as bringing into this trial a question other than that which is set forth in the complaint, and on the ground that the only matter to be inquired of here is the article that was actually published, and not the dispatch which was delivered at Cincinnati.

The Court overruled the objection and admitted the evidence, to which ruling defendant duly excepted, which exception was duly noted and allowed.

276 Plaintiff's counsel then read the answer of the witness, as follows:

"A. No."

Plaintiff's counsel then read the following question:

"Q. When you found him, was he living in luxury?"

Defendant's counsel objected again to evidence being received bearing upon the matters affecting Mr. Smith as incompetent, irrelevant and immaterial, and as irrelevant to the issues and

as bringing into this trial a question other than 277
that which is set forth in the complaint, and on the ground that the only matter to be inquired of here is the article that was actually published and not the dispatch which was delivered at Cincinnati.

The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

Plaintiff's counsel then read the answer of the witness, as follows:

"A. He was living in a small hotel; hardly luxurious; just a country hotel. 278

Plaintiff's counsel then read the following question:

"Q. When did Mrs. Smith return to Cincinnati?"

Defendant's counsel objected again to evidence being received upon the matters affecting Mr. Smith as incompetent, irrelevant and immaterial, and as irrelevant to the issues and as bringing into this trial a question other than that which is set forth in the complaint, and on the ground that the only matter to be inquired of here is the article that was actually published and not the dispatch which was delivered at Cincinnati. 279

The Court overruled the objection and admitted the evidence, to which ruling defendant duly excepted, which exception was duly noted and allowed.

Plaintiff's counsel then read the answer of the witness, as follows:

"A. With her husband."

Plaintiff's counsel then read the following question:

280 "Q. When was that?"

Defendant's counsel objected again to evidence being received bearing upon the matters affecting Mr. Smith as incompetent, irrelevant and immaterial, and as irrelevant to the issues and as brlnging into this trial a question other than that which is set forth in the complaint, and on the ground that the only matter to be inquired of here is the article that was actually published and not the dispatch which was delivered at Cincinnati.

The Court overruled the objection and admitted the evidence, to which ruling defendant duly excepted, which exception was duly noted
281 and allowed.

Plaintiff's counsel then read the answer of the witness, as follows:

"A. About August 17th, I guess; I think we came back the night the article came out in the *Post*."

The plaintiff to maintain the issues on his part then called as a witness:

ALFRED S. BROWN, who being first duly sworn, testified as follows:

I am the electrical engineer in the Western Union
282 Telegraph Company. I have general supervision of electrical matters for that company; I have held that position for about six years; between five and six years.

By Defendant's Counsel: We will assume he is a competent expert. I concede he is a competent expert.

I have been at work as a practical electrician since 1853—forty-two years. I have been an actual telegraph operator myself for about twelve years.

Q. I show you the dispatch claimed to have been filed at Cincinnati, and which is in the case as De-

fendant's Exhibit 3; I show you also the dispatch as 283
published in the newspapers, and I ask you to examine them. You will notice that there are the following differences between the dispatch as filed in Cincinnati and the dispatch as it is claimed to have been received in New York. These words are omitted from the beginning: "Evan Smith, who was confidential man for his brother-in-law Alexander"; then the following words are omitted out of the dispatch: "the millionaire." Further down in the dispatch the following words are omitted: "a town." Then the entire last sentence is omitted, namely, "McDonald claims that Smith's accounts are straight, but that he is insane, and will be brought to a sanitarium here." Please tell the 284
jury whether these are the kind of errors which arise in the transmission of messages over the wires?

Objected to as irrelevant and beyond the province of expert testimony.

The Court: I don't think the question in that form is competent. I think you may ask him, assuming the original dispatch to have been worded as it is said to have been, and to have been delivered here as it is said to have been, if in the usual course of telegraph business such a discrepancy could have occurred.

Plaintiff's counsel thereupon asked the wit- 285
ness the said question, to which question counsel for the defendant objected on the ground that it was irrelevant and beyond the province of expert testimony. The objection as to competency is intended to raise the question that this expert necessarily speaks more than as an expert. He is compelled in answering this question to pass on the question of fact involving the care with which employees of the company exercise their duties, and various other matters of that character which it seems are beyond the province of an expert.

286 The Court overruled the objection and admitted the evidence, to which ruling the defendant duly excepted, which exception was duly noted and allowed.

To which question the witness answered as follows:

A. No, such a discrepancy could not have occurred in the usual course of telegraph business. It is a discrepancy that is not to be attributed to an error of transmission, in my judgment.

CROSS-EXAMINATION:

287 On cross-examination by defendant's counsel the witness testified as follows:

Q. Errors do occur in transmission frequently? A. Very frequently.

Q. You send dispatches to buy 100 shares and deliver five frequently, don't you? A. No.

Q. Well, five and deliver 100, which is just as bad? A. Hardly.

Q. There are a great many suits pending against the Western Union for such errors, are there not? A. That would be a very unusual error. If you sent it "two" and received it "ten," it would be a very usual practice.

Q. That is a good deal more shares than I had in
288 mind. A. 2,000 for 10,000, or two for ten. There are errors that are very likely to happen and others that are almost impossible.

Q. There is no doubt whatever that constant errors occur in the transmission of telegrams. A. Those errors arise from different causes. They may arise from trouble with the wires and they may arise from carelessness of the operators. It would not be very remarkable for an error to have arisen concerning this particular dispatch by which the words "Evan Smith" were dropped out.

Q. If the words "Evan Smith" were dropped out all the other words that were taken from that dis-

patch would be meaningless, wouldn't they—that is, all the other discrepancies? A. I shall have to look it over and see if it would be meaningless. I don't know whether it would or not. It would be meaningless, because the next word is "who." 289

Q. Let us take the end of it: "McDonald claims that Smith's accounts are straight, but that he is insane and will be brought to a saniturium here." If Mr. Smith's name was left out there would be very little meaning in the last sentence.

The Court: Of course the telegraph company could not put meaning into a sentence.

By Defendant's Counsel: The question is what they do. 290

A. I will modify my previous answer if you are going to put that construction upon it.

I know Mr. William H. Eckert. He is a man of prominence in telegraphy—a man in whom I have confidence. He is not connected with the Western Union that I am aware of. I think he never had been connected with them. I don't know that I am able to tell exactly what his line of business is at present. He has been connected with the telephone business and also with the telegraph business, but he is not at present connected with the telegraph.

Q. I will put to you the same question that was put before: Is it not possible that with the name of Evan Smith left out, and therefore the other words left out at the commencement, and the last three lines at the end having no signification, that an employee of the company might, in order to make that dispatch to him mean something, have left out the concluding sentence? The answer to that was "yes?" A. You did not put that question to me. 291

Plaintiff's counsel objects to the question as incompetent and unintelligible.

The Court: I think the inquiry to the witness should be limited to such questions as involve some

292 peculiar expert knowledge. The jury are not supposed to know anything about the transmission of the dispatch other than it is given to an operator and received by another operator at the other end of the line. What takes place intermediately I don't profess to know, and I don't suppose the jury do, as to whether any such error as is said to have taken place here could occur. Intermediate transactions I think the witness is competent to speak of.

Q. You intended to limit your answers that you gave on your direct-examination to errors liable to take place in the transmission of messages and not to errors in the transcribing of the same by the operators at the office where received? A. I meant
293 to include the transcribing.

Defendant's Counsel: Then I submit to your Honor that the whole evidence is competent.

The Court: I will strike out the transcribing.

The Witness: I intend to say that there may be errors in transmission and there may be errors in transcribing, both.

Q. What was it you said on your direct as to errors which apparently took place concerning these two dispatches—that they were errors that might have occurred in transmission and transcribing or not, in your judgment? A. I think this discrepancy is not to be accounted for by any possible assumption of error, either in transmission or in transcrib-
294 ing.

Q. Then you mean to carry your answer so far as to say that you do not think it is possible that the Postal Telegraph Company could have delivered the dispatch in the form in which it is printed? A. I do not think it is possible.

Q. That is expert evidence? A. That is my opinion.

Q. Nevertheless it might have happened? A. You say it might.

Q. What do you say? A. I say in my opinion the dispatch never was delivered in that shape.

Q. And may I ask you in what shape you think it 295
was delivered? A. You may.

Q. What was it? A. I think it was delivered probably in the same shape in which it was filed.

Q. In which it was originally sent? A. Yes.

Q. And the *World* went deliberately and rubbed out Smith's name and said something ugly about McDonald? A. Really I don't know whether the *World* did or not.

Q. I suppose your idea is that very few errors occur in the transmission or trauscribing of messages? A. No, that is not my idea.

Q. Oh, it is only of this particular character? A. This remarkable character; yes.

296

By the Court:

Q. I think you mean to say that in your opinion the changes in this telegram bear marks of deliberation rather than of accident? A. In my opinion that this dispatch bears evidence of editing.

By Defendant's Counsel:

Q. By a telegraph operator? A. From what I know of the usual custom of business, telegraph operators do not edit messages.

Q. Would it be a very extraordinary thing if a telegraph operator had a dispatch which was meaningless by reason of leaving out the name of the per- 297
son to whom it referred, that he should drop from the dispatch some expression which was meaningless as long as the rest of the dispatch would apply to some other person who was also named in the dispatch? A. I should regard it as most extraordinary.

Q. It would be against the rule and custom? A. Certainly.

Q. He would have no right to do so? A. No right.

Q. And you have known as extraordinary errors as that to occur, have you not? A. I never did.

Q. You have dismissed men for errors? A. For deliberately erasing a portion of the message?

298 Q. Not necessarily, but for errors as gross and as important as this? A. I never saw as gross an error as this.

Q. In all your experience in the Western Union office? A. That is what I think.

Q. Your idea rather, as an expert, is this: If there was any change in this dispatch it was made by some other person than one of the employees of the Postal Telegraph Company? A. That would be the most probable explanation of it.

[THE PLAINTIFF THEN RESTED.]

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299 The testimony was here closed, whereupon the counsel for defendant then moved the Court to instruct the jury to render a verdict in favor of the defendant on the ground that the article complained of does not contain any language that is libellous *per se;* that the language is plain, and that it is the duty of the Court to determine its meaning, and that there is nothing in it of a character to justify its being left to the jury.

On the further ground that the plaintiff cannot by innuendo add to the plain meaning of language, and cannot put a construction upon the language which is not its natural import.

300 Upon the further ground that the plaintiff in this case charges as his innuendo in substance that the effect of the article was to charge the plaintiff with embezzlement, or a crime of that nature, whereas by the laws and treaties of the United States, and especially the treaties of the United States with Great Britain, a person who was guilty of the crime of embezzlement was extraditable at the time of this publication, and had been for at least two years prior thereto, from any part of Great Britain, including Canada; and therefore any construction that could be claimed to be put upon it that Canada was a haven for persons who had been embezzlers,

or criminals of that nature, could not be put upon it 301
in view of that statute at the time of this publication. Also on the ground that there is no evidence in the case of express malice on the part of the defendant.

By Defendant's Counsel: I have stated the only grounds on which, in my judgment, I am entitled to the direction of a verdict. There are some questions of law bearing upon the subject.

The Court: I don't care to hear any questions of law discussed. I don't think I can be enlightened by discussion.

To this ruling and decision of the Court defendant's counsel did then and there duly except, which exception was noted and allowed. 302

The Court then said:

You will have a chance to discuss those in an appellate court if it becomes necessary. I shall deny your motion. I shall rule that under the language of this publication it becomes a question for the jury to determine whether it was libellous in the sense that it was calculated to bring the plaintiff into disrepute and discredit. And as to the question of malice, if they find the article was libellous and untrue, the law implies malice. Although there was no actual malice on the part of anybody connected with the *World* newspaper, that cannot 303
affect the plaintiff's right to recover compensation. I will give you an exception.

To which ruling and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

The counsel for the defendant summed up the case for the defendant and the counsel for the plaintiff summed up the case for the plaintiff, and the said Judge did then and there charge the said jury as follows:

304 WALLACE, *J.*—Gentlemen of the Jury: As you already thoroughly understand, this is an action of libel brought by a citizen of Cincinnati to recover for what he alleges to be a defamatory publication which appeared in the columns of the *World* newspaper in this city in August, 1892.

I will preface the observations which I deem it my duty to make in this case by reading some general observations applicable to cases of this kind, from the opinion of a Court of high authority, and then I will proceed to instruct you as to the rules of law which are more specially applicable to the particular facts under consideration:

"The law favors the freedom of the press, so long
305 as it does not interfere with private reputation, or other rights entitled to protection. And, inasmuch as the newspaper press is one of the necessities of civilization, the conditions under which it is required to be conducted should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals, or voluntarily subjected to private scrutiny. And since an injurious statement, inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of
306 having such libels creep into their columns to the lowest degree which reasonable foresight can secure.

"The danger and the precautions necessary to prevent it are directly connected with the business itself; and all who voluntarily assume the responsibility must exercise it under similar conditions. It is the right of the citizen to be secure against all unlawful assaults; and no distinction can be reasonable which allows the care required in the conduct of any avocation, attended by risks to third persons, to be varied by the private or corporate character of its conductors."

"Where the wrong done consists in a libel—which 307
can never be accidental—the publishing is therefore always imputed to a wrong motive, and that motive is called malicious. And, in the absence of any testimony showing the origin and circumstances of the publication, it stands before the jury as a voluntary wrong until palliated or excused, while the actual motive, whether intensifying or mitigating the moral guilt, may be shown to qualify it.

"If evil motives arising out of ill will or revenge are shown, the moral guilt of the perpetrator will be very much enhanced. If such motives are negatived, the evil quality of the act will in like manner be reduced, and it will appear to all persons much less reprehensible." 308

"There is no doubt of the duty of every publisher to see at all hazards that no libel appears on his paper. Every publisher is, therefore, liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feeling as must unavoidably be inferred from such a libel, published in a paper of such a position and circulation. But no further damages than these should be given if he has taken such precautions as he reasonably could to prevent such an abuse of his columns. When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor which such carefulness would justify in mitigation of that portion of 309
the damages which is awarded on account of injured feelings.

"The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of a publisher to a minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling beyond what is inevitable from the nature of the

310 libel. And no amount of express malice in his employees should aggravate damages against him when he has thus purged himself from active blame."

Ordinarily it is a question for the Court and not for the jury to determine whether a given publication is libellous. In this particular case the question is one of fact for the jury to determine, applying the rules of law which define the meaning of a libel. A libel is any publication concerning another which is untrue and which is of a character calculated to bring him into public obloquy or discredit. It is not necessary that the article charge the commission of a crime. It is sufficient if it conveys the
311 imputation of an offense against decency and good morals of a character which ordinarily reflects discredit upon the person guilty of such an offense. Now I have had occasion during an earlier stage of the progress of this case to consider the question whether the publication upon which this action is based is upon its face one which it is the duty of the Court to declare not to be libellous, and I came to the conclusion that it was not such a publication, but that it was one to be submitted to the jury for them to consider, for them to place their interpretation upon the whole scope and tenor of the article, and conclude whether it was a libel because its natural tendency is to convey the
312 impression of the imputation of an offense against morality and decency, or the civil laws.

I will read you from an opinion which I had occasion to express when this case was before this Court upon demurrer:

"The complainant shows that the defendant printed and published of and concerning the plaintiff, a citizen of the State of Ohio, residing at the City of Cincinnati, the following alleged defamatory matter:

" ' MISSING MILLIONAIRE MCDONALD LOCATED. 313

" ' CINCINNATI, O., Aug. 17.—McDonald, Southern Ohio manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada.'

" The innuendo is stated as 'Meaning and intending to accuse the plaintiff of odious and disgraceful conduct and to bring him into disrepute and disgrace, and meaning and intending that the plaintiff was obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains.'

" The construction which is to be put by the Court upon a publication which is alleged to be libellous is to 314
be derived as well from the whole scope and apparent object of the publication as from the expressions used. It is not to be dissected and analyzed to see whether the several parts standing alone are innocuous, but it is to be read as a whole in order to ascertain what general impression it is calculated to convey to those who see it. If when thus read the language is equivocal and capable of being understood as conveying an injurious imputation, even though it is also capable of an innocent meaning, it is not for the Court but for the jury to determine in what sense the language is used.

" Applying these rules, the question here is
whether a jury would be authorized to find that the 315
publication in any sense which can be legitimately put upon, it is calculated to injure the reputation of the plaintiff in the common estimation of mankind, expose him to contumely or make him contemptible or ridiculous. If it is, it is libellous, although it imputes no crime."

Now, gentlemen, you are to take this article and, applying the rules of common sense, are to say what is the impression which you derive from it. Is it one which naturally and fairly conveys to you

316 the impression that the plaintiff had disappeared because he had been guilty of some offense against the law, or of some act of wrong, of turpitude, which had induced him to leave his home and take up his residence in a foreign country? If you find that the article does naturally convey this impression, then it is a libellous article. On the other hand, you are at liberty to say that everything which is contained in the article is reconcilable with propriety of conduct on the part of the plaintiff; that the fact that a man has strangely disappeared does not necessarily impute any wrong motive for his disappearance; that the fact that he is found after a disappearance of several months, living in luxury in
317 Canada, does not necessarily impute that there was any peculiar reason, any reason inconsistent with his entire respectability of character.

Now, it is not for me to express to you my opinion as to the character of this article. You are to take it and read it as sensible men and ask yourselves the question whether, reading it as a whole, reading it, if you please, between the lines, it is calculated to lead you, or those who see it, to believe that the plaintiff had disappeared, secreted himself in a foreign country, because he had been guilty of some act either criminal or of moral turpitude which rendered residence in his native land no longer desirable.

318 Now, if you come to the conclusion that this article is not a libellous article, that is an end of this case. If you conclude that it is libellous in its nature, inasmuch as it is conceded to have been published by the defendant, to have been published of and concerning the plaintiff, and inasmuch as it is not contended that any of the statements contained in the article were true, which were derogatory, then the only question for you is as to the amount of damages which the plaintiff is entitled to recover. He is certainly entitled to recover damages, and the question is how much. Damages in actions for defamation are awarded for in-

jury to reputation, and the extent of the injury 319
is determined largely by the character and position of the plaintiff, and somewhat also by the publicity, the extent of circulation, given to the defamation. Publication in an obscure newspaper, which would have only a limited circulation, in a community with a small population, would of course be much less injurious than a publication in a newspaper which has a circulation throughout the country.

If you find that the plaintiff is entitled to recover, he is entitled to such a judgment as will afford him a reasonable recompense for the injury to his reputation, taking into consideration his position and the nature of the publication and the extent of the cir- 320
culation of the libel. There is no mathematical rule by which you can determine the extent of injuries to a man's reputation. It is a matter which always rests in the sound judgment and discretion of the jury. But under any circumstances in this case, if you reach the conclusion that the publication was libellous, then the plaintiff is entitled to compensation to the extent of the injury which he has sustained to his character. Further than that, he is entitled to compensation for the injury to his feelings, the pain and suffering of mind, if any, and there was, inflicted upon him by the publication of this article. These are damages for the direct consequences of the publication of a libel.

321
Well, gentlemen, in actions for libel not only are the parties injured entitled to compensatory damages, but under certain circumstances it is the duty of the jury to award exemplary or punitive damages against the defendant; and it may become a question of considerable importance to you in your deliberations in this case whether upon the facts which have been introduced in evidence this is a case in which damages should be rendered against this defendant which the law terms punitive damages, damages by way of example, damages which are given for the purpose of deterring others from committing like

322 offense against the peace and the reputation of others.

The law presumes that every libellous publication is, technically, malicious. It does not presume, however, that it has been animated by personal malice. It is not necessary in order to entitle a plaintiff to recover that the article should have been animated by personal malice. But before exemplary damages can be awarded it is necessary for the jury to find upon the evidence in the case either that the article was inspired by personal malice or that it was published under such circumstances of wanton recklessness and carelessness as to the rights of others as to amount to malice in law. Now in this case there
323 is no evidence whatever that the article in question was inspired by any personal malice on the part of the defendant towards this plaintiff, nor even on the part of any of the employees of the defendant towards the plaintiff; so any issue of that sort is eliminated from this case, and the question which, upon this branch of it, will be for you to determine is whether it was published under circumstances of wanton neglect, wanton disregard of the rights of other people, wanton absence of those precautions which reasonable and intelligent men should take in the conduct of the business of a great paper like the *New York World;* and unless you find this to have been the case, then the plaintiff in no view of the
324 facts is entitled to a verdict for exemplary damages.

I will content myself upon this branch of the case with reading to you the charge which was made upon the former trial of the case and which has been considered by the appellate Court and may be accepted, by this Court at least, as a correct exposition of the law:

"In addition to the general damages to which plaintiff is entitled he claims punitory damages, which are such damages as shall deter the defendant from like conduct, in case malice in fact or clear and express malice has been shown."

"In this case it is not shown that the defendant

had any knowledge of, or animosity against, the plaintiff. It did not publish the article for the purpose of injuring him, and therefore there is no claim that express malice can be shown by any direct intention to injure the plaintiff. But it is claimed and it is true, that express malice also may be shown by a reckless and wanton carelessness whether the publication is truthful or not, a wanton neglect to ascertain its truth when means of accurate knowledge are readily attainable. A reckless lack of knowledge or care to know whether a grave imputation of crime or criminal or fraudulent conduct is true or false, and the absence of precautions taken to obtain knowledge of the truth of a charge of criminality against a person in regard to whom accuracy was obviously easily attainable, may be adduced to show what the law terms express malice. 325 326

"The plaintiff says that the system of the defendant in its publication of special dispatches, which was followed in this instance, and which is in substance the publication of special dispatches, if the editor deems them important and if no suspicion is raised in his mind of their accuracy, without re-investigation of the truth or falsity of the charge, is a reckless and careless system. It is insisted for the plaintiff that it is unimportant to the public to know with haste whether Mr. McDonald, the manager of a wealthy corporation, had strangely disappeared and had been found after an absence of six months living in luxury; that it is important to the character of Mr. McDonald and to his right to his good name that the public should be told the truth, and that delay is not dangerous, but would be fruitful of good results; and the argument is that this case is an illustrative instance. 327

"According to the theory of the defendant a dispatch had been sent from Cincinnati in regard to Mr. Evan Smith untruthful in its character and in its suggestions. That when received it was received in the shape in which it was published; and had been so missent as to state that Mr. McDonald, the

328 wealthy manager, and not Evan Smith, had disappeared six months before. And so the plaintiff says that delay, investigation, inquiry, would have revealed that neither story was correct, and that the story as properly corrected was one of domestic affliction with which the public is not called upon to intermeddle. The defendant says that the system is unavoidable; that the *New York World* is a very large daily paper with a very large circulation; that it has 1,200 correspondents carefully selected and instructed; and that 15,000 to 20,000 words of telegraphic matter come into the office every night, and that there can be no sifting-out process by delay and re-examination, that it is impracticable, and that
329 the public demands news. To this plaintiff replies that haste is unimportant, accuracy is important; and if special correspondents are taught by experience that investigation will follow dispatches which border upon a sensational character accuracy will become universal and uwarrantable imputations upon private individuals will cease.

"The question whether any punitory damages are to be given depends upon your conclusion whether this publication was made with recklessness and with a wanton disregard of the question of its truth or falsity. Upon this question the plaintiff takes the burden of proof. If you find in the affirmative, you are not compelled, but are permitted, to give
330 such reasonable and just damages as you think it wise to give in order to deter like conduct in the future, the amount of vindictive damages is within your discretion, but it is my duty to caution you against excessiveness. You are to be reasonable and just. This question of punitory damages or no punitory damages is practically the most important one in the case.

"The defendant puts forward, in addition to the general care which it says it uses in the publication of dispatches, that the dispatch itself was transmitted by mistake, that it was not filed in the Cincinnatti office in regard to the plaintiff but in regard to Evan

Smith; and that the statements in regard to Smith were accidentally dropped without the knowledge of the defendant, and McDonald was substituted as the principal person in the dispatch. All these alleged facts you are permitted to examine and consider and give them weight you think proper in mitigation of damages. If you think that sufficient care was taken, that sufficient caution was exercised, or if the alleged mistake was a sufficient excuse for the publication, you will not find vindictive damages or any damages in excess of just compensation to the plaintiff. It is said that the dispatch as filed related to Mr. Smith. You are not to examine or consider whether the dispatch as filed was libellous on the plaintiff, or whether it was libellous on Mr. Smith, or whether if it had been published as filed it would have been libellous on the plaintiff. The real and important question as it occurs to my mind is whether the dispatch as published, and upon the theory that it was a mistake, and admitting that it was a mistake, was published with such recklessness and indifference to the truth as justly to charge the defendant with express malice. 331 332

The defendant is a corporation, and cannot be visited with exemplary damages, although its employees were guilty of express malice in the publication, unless the corporation has authorized the system or conduct, which is the only system relied upon as indicative of express malice in the case. The rule or custom known to and authorized by the corporation is that unless the dispatch is so contradictory and raises in the mind of the editor a suspicion of its accuracy, he cannot change the facts, but it is optional with him to judge of its importance, and withhold it from the composing room." 333

That remark, gentlemen, while it may have been applicable upon the testimony in the case when it was previously before the Court, perhaps is not applicable here, because you will remember that the testimony is that dispatches of the character of the one in question when received are received by the

operator, and are given to the telegraph editor, and the telegraph editor sends them to a sub-editor and the sub-editer has authority to cut down and eliminate the dispatch.

Now, gentlemen, the facts in this case have been very fairly discussed by counsel for the parties, and I do not deem it my duty to go into them in any detail. I think my duty is properly discharged by leaving the case to you upon such general observations as I have read to you from the opinions and supplemented by my own instructions. It is hardly necessary for me to say that this case is to turn upon the merits as they appear upon the evidence before you, to be determined without prejudice, and not upon the consideration that newspapers generally are reckless or careless in dealing with the private reputations of people, but is to be determined by the facts in this particular case.

Now, in the event that you find the article to have been libellous, the plaintiff is entitled to compensatory damages; that is, such damages as will recompense him for injury to his reputation and for injury to his feelings. If, in addition to that you find, applying the rules of law as they have been delivered to you, that the case is one where the publication was made under circumstances of such recklessness and wantonness as to be equivalent to malice, then you are at liberty to award a verdict of exemplary damages. But upon this branch of the case you are to take into consideration the circumstances of this special case. If you find that the defendant had employed a reliable correspondent at Cincinnati, received the dispatch in the ordinary course of business, supposing it to come from that correspondent, published it as it was received, and you can say in addition to that that there was nothing in the circumstances which required the defendant, in the exercise of its business of producing news for its morning issue, to stop to investigate for the purpose of ascertaining whether these statements were accurate or not, but that what is did was what

any ordinarily careful and intelligent man would have done under the same circumstances, then those facts are to be taken in mitigation of damages and will reduce any recovery to which you may find the plaintiff entitled, simply to compensatory damages. 337

The case is with you.

The following colloquy then took place:

Defendant's Counsel: There is one point in your Honor's charge where you say to the jury that the plaintiff certainly would be entitled to recover damages, but the question is how much, and it was not limited by what I think your Honor understood that it was limited by, in the event that they found the article was libellous. 338

The Court: I think they understand that.

Defendant's Counsel: Your Honor also stated to the jury that they could take into consideration the question of the size of paper, large or small, as to the amount of damages that they may bring in. I ask you to instruct the jury in that regard that they are also entitled to take into consideration the difference that arises from the publication of a newspaper at the domicile or residence of the party, where he is largely and widely known, and also in foreign places where he may not be so largely and widely known.

The Court: I so charge. 339

Defendant's counsel did then and there duly except to so much of said charge as instructed the jury that it may become important in their deliberations to determine if punitory or exemplary damages should be given.

Also to so much of said charge as instructed the jury that the plaintiff is entitled to recover, if entitled to recovery at all such damages as would compensate him for injury to his reputation, taking into consideration his position and that of the defendant, which exception was noted and allowed.

340 Now, as to my requests, I understand the first, second, third and fourth——

The Court: I decline to charge any of the requests, except as I have already charged. I will run them over once more to see if there is anything I have not covered.

Defendant's Counsel: The first, second, third and fourth are mere matters of law, and I will except.

The Court: I think I will charge one request, which possibly I have not covered, because I have discussed the facts very little in this case.

At the request of defendant's counsel the Court
341 further charged the jury as follows: I am requested to instruct you gentlemen, and I do instruct you as follows:

"That if the jury find that if the plaintiff in the ordinary course of business employed a correspondent at Cincinnati for the purpose of sending it news for which it paid when it used the same, and that such correspondent had been in the employment of the defendant for some months, and that said correspondent was authorized to employ a sub-correspondent from time to time as he saw fit, and that there is no proof to show carelessness or error on the part of such correspondent or of those employed by him in the past, and that such sub correspond-
342 ent employed by him, on or about the 17th of August, 1892, sent a dispatch in substance the same as complained of in this action, except that it referred to one Evan Smith and not the plaintiff, and that by error in transmission or error on the part of some of the employees of the defendant, against whom, however, no evidence of incompetency was produced, the name of Evan Smith was omitted and the dispatch was left to refer to the plaintiff, and the defendant thereupon published the dispatch as received, in reliance upon the correctness of its news from its Cincinnati correspondents; that the jury cannot find that the de-

fendant has been guilty of such gross or wanton 343
carelessness or such reckless conduct as to justify the infliction of punitory damages in this action."

Defendant's Counsel: I neglected to note an exception to your Honor leaving it to the jury to, in any event, upon the evidence in this case, inflict punitory or exemplary damages.

The Court: Very well. I will mark them all as refused, except the 36th, which is charged.

Thereupon defendant's counsel requested the Court to instruct the jury as follows:

I.—That the language used in the article which is complained of as libellous in the complaint in this 344
action, is not libellous *per se.*

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

II.—That the article complained of in the complaint is not libellous *per se.*

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

345
III.—That the words used in the article complained of in the complaint are not ambiguous, and it is the duty of the Court, as matter of law, to determine that the same are not actionable.

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

IV.—That the publication complained of as a whole does not permit an interpretation defamatory to the plaintiff.

346 Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

V.—That Canada is not a haven of refuge for criminals, and is not a shelter for offenders against the laws of the United States.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

VI.—That by the terms of the treaty existing be-
347 tween the government of the United States and the government of Great Britain, all persons guilty of embezzlement, receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulenly obtained are subject to extradition, as are also all persons guilty of fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

348 VII.—That such treaty was in full effect and operation at the time of the publication complained of in the complaint, and had been in full effect and operation for two years prior thereto.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

VIII.—That the plaintiff in this action, by way of innuendo charges that the defendant, by the publication complained of, accused him of the crime of

embezzlement or of being accessory thereto, and to have understood and believed that he was guilty of a great and infamous crime, and meaning and intending to accuse the plaintiff of odious and disgraceful conduct, and meaning and intending to charge that the plaintiff had been obliged to secretly run away to Canada and that he was there found living in luxury on his ill-gotten gains. That plaintiff having selected the foregoing as his innuendo, cannot go to the jury on any other claim. 349

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed. 350

IX.—That unless the jury find that the fair meaning of the article was to convey the impression that the plaintiff had been guilty of embezzlement or of being accessory thereto, or that the fair meaning of such article was to accuse the plaintiff of and to have it understood and believed that he was guilty of a great and infamous crime or that the fair meaning of the article was to accuse the plaintiff of odious and disgraceful conduct and thereby to injure and destroy his character, and bring him into disrepute and disgrace, or that the fair meaning of the article was that the plaintiff, for some or all of the reasons aforesaid, had been obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains, their verdict must be for the defendant. 351

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

X.—That the jury cannot give a verdict for the plaintiff merely because they shall consider that the fair meaning of the article was to impute to the

352 plaintiff some other crime or some other defamatory act.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XI.—That the burden of proof is upon the plaintiff in this action, and he must satisfy the jury by a fair preponderance of proof on all the issues that must be maintained by him in the action.

Which request the Court refused, and to said refusal and decision of the Court defendant's
353 counsel did then and there duly except, which exception was duly noted and allowed.

XII.—That the gist of the action of libel is malice.

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XIII.—That unless the jury find that the defendant was guilty of malice, there can be no recovery in this action.

Which request the Court refused, and to said refusal and decision of the Court, defendant's
354 counsel did then and there duly except, which exception was duly noted and allowed.

XIV.—That there is no evidence in this case justifying a finding of express malice.

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XV.—That there is no evidence in this case that the defendant was influenced by actual or express

malice toward the plaintiff in making the publication complained of. 355

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XVI.—That express malice is when one with a deliberate mind and formed design commits the acts complained of.

Which request the Court refused, and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed. 356

XVII.—That there is no evidence in this case justifying a finding that the defendant was so grossly and recklessly negligent or wantonly indifferent to the rights of the plaintiff as to permit a finding of express malice therefrom.

Which request the Court refused and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XVIII.—That it is not gross negligence for a person receiving a telegram to act upon its contents.

357

Which request the Court refused and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XIX.—That it is not gross negligence for one receiving a telegram to act upon its contents without causing the same to be repeated.

Which request the Court refused and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

358 XX.—That in determining this question the jury is bound to take into consideration the necessities of the business of the defendant, and to consider the enormous amount of matter received every day, and the evidence tending to show that it would be impossible to repeat the telegrams received in time to give the same to the public in accordance with the usual course and custom of the defendant's business.

Which request the Court refused and to said refusal and decision of the Court, defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXI.—That in determining this question, the jury
359 are bound to take into consideration all evidence tending to show the general accuracy and safety of the business conducted by the defendant in reliance upon telegrams received from its correspondents all over the world, and the few instances in which errors occur.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXI.—That if the jury find that the defendant for years has been in the habit of conducting its business, so far as the publication of telegrams from
360 other localities are concerned in the way of news, in the manner set forth by the defendant's witnesses in this action, and there is no evidence to show that on any other occasion any errors have occurred prejudicial to any person whomsoever, that then the jury are bound to find that it has not conducted its business in a reckless manner, or has been wantonly indifferent to the rights of the plaintiff.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXII.—That the jury are bound to take into consideration the enormous amount of business done by the defendant, and the enormous amount of telegrams received each night and the propriety of giving the same to the public the following morning. 361

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXIII.—That the collecting of news and the publishing of the same is a lawful business, and the defendant is not bound in order to avoid the charge of wanton reckless or gross negligence to adopt such course as will insure in every instance the accuracy of the dispatch received. 362

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXIV.—That all that the defendant is bound to do is to exercise such ordinary diligence in the management of the particular business carried on by it, as an ordinary wise and prudent man would exercise in a similar case.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed. 363

XXV.—That if the jury shall find that the defendant pursued such course, then in the absence of proof that on some prior occasion errors have arisen to the damage of some person, then the jury are bound to find that there was no such reckless indifference or wanton negligence as to justify a finding of express malice.

Which request the Court refused, and to said refusal and decision of the Court defendant's

364 counsel did then and there duly except, which exception was duly noted and allowed.

XXVI.—That vindictive damages are given by way of punishment and by way of punishment alone.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXVII.—That such punishment should not be inflicted upon a defendant who exercises such ordinary care as the exigencies and nature of its busi-
365 ness demand, and as would be exercised in the conducting of the same business by an average man of ordinary prudence.

Which request the Court refused and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXVIII.—That there is no evidence in this case to show that the defendant had any knowledge of or animosity against the plaintiff, and, therefore, there is no direct evidence from which the jury can find that the alleged libel was published for the purpose of injuring him.

366 Which request the Court refused and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXIX.—That even if it be the law that express malice may be shown by reckless and wanton carelessness or wanton neglect to ascertain the truth of a publication, yet such rule has no application to this case.

Which request the Court refused, and to said refusal and decision of the Court defendant's

counsel did then and there duly except, which 367
exception was duly noted and allowed.

XXX.—That even if it be the law that express malice may be shown by reckless and wanton carelessness, such express malice can only be found where the plaintiff has shown by a substantial preponderance of proof that such reckless and wanton carelessness in fact exists.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXXI.—That oven if it be the law that express 368
malice be shown by reckless and wanton carelessness; such a finding of reckless and wanton carelessness cannot be predicated upon mere assumption, must be founded upon evidence.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXXII.—That in this case there is no proof to sustain such a finding.

Which request the Court refused, and to said refusal and decision of the Court defendant's 369
counsel did then and there duly except, which exception was duly noted and allowed.

XXXIII.—That in this case the evidence shows that the defendant employed a correspondent in whom it had confideuce in Cincinnati, and who sent it news for which he was to be paid if the same was used.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

370 XXXIV.—That the defendant had employed the Postal Telegraph Company, a corporation doing a telegraph business in the United States, to transmit such dispatches from its correspondent in Cincinnati to New York, and that such evidence of precautions cannot be overcome or thrown aside by the mere proof of failure on the part of the defendant to make other or further inquiries concerning the correctness of the dispatches it received.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

371 XXXV.—That to authorize a finding of reckless and wanton carelessness a plaintiff is bound to make out a case of justifying such finding and must establish by a preponderance of evidence such fact to the satisfaction of the jury.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXXVII.—That even if it be the law that express malice may be shown by reckless or wanton carelessness on the part of the defendant, in order to justify the infliction of punitory damages, plaintiff
372 is bound to establish by a fair preponderance of evidence facts which establish reckless and wanton carelessness on the part of the defendant concerning the publication of the article in question.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXXVIII.—That the defendant is not liable in punitory or exemplary damages for mistakes made by its servants or agents, unless such servants or

agents are shown to be incompetent or to have made mistakes on previous occasions which have come to the knowledge of the defendant. 373

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XXXIX.—That all men are equal before the law.

Which request the Court refused and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed. 374

XL.—That in an action seeking to recover damages for the publication of an alleged libel, all plaintiffs of the same moral character and reputation stand upon an equal footing, and the fact that the plaintiff in this action may hold a high social position does not justify a larger verdict in his favor than would be given to any other person of equally good moral character.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XLI.—That the fact that the plaintiff is a member or officer of various clubs and social institutions, is not to be considered by the jury in determining the question of damages. 375

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XLII.—That the defendant is not liable for the wrongful negligence or malicious acts of its agents, unless it has directed or ratified such acts.

376 Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XLIII.—That the defendant is not liable for mistakes made by its servants or agents, unless such servants or agents are shown to be incompetent, or to have made similar mistakes on previous occasions, which have come to the knowledge of the defendant.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which
377 exception was duly noted and allowed.

XLIV.—That there is no proof on which special damages may be given in this action.

Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XLV.—That the question as to whether this dispatch, relating to Mr. Evan Smith sent from Cincinnati, was correct or not, is not involved in this action.

378 Which request the Court refused, and to said refusal and decision of the Court defendant's counsel did then and there duly except, which exception was duly noted and allowed.

XLVI.—That if the jury find that the dispatch was made to refer to Alexander McDonald, the plaintiff, instead of to Evan Smith, by reason of accident or mistake on the part of the Postal Telegraph Company, then they cannot award exemplary or punitory damages in this action.

Which request the Court refused, and to said refusal and decision of the Court defendant's

counsel did then and there duly except, which 379
exception was duly noted and allowed.

The jury then retired.

The jury returned to the Court room at 4.30 P. M., when the following discussion took place:

The Court: Gentlemen, I have received a request for some further instructions. Will the juror who desires the instruction please formulate the request?

A Juror (No. 12): The point upon which I wanted to be instructed is this: If we find that the defendant is guilty of libel and find that no substantial damages resulted from that libel, could we award punitive damages—make the compensatory damages 380
nominal and then award any amount of punitory damages that we consider proper?

The Court: The award of punitory damages is in the discretion of the jury. I have instructed you that punitive damages were not to be allowed unless you found that the publication was actuated by express malice, or if not actuated by express malice was published under such circumstances of wanton recklessness and indifference to the rights of others as to practically amount to malice. Now, it is for you to say, upon the facts in this case, whether there was that recklessness of conduct on the part of the defendant in this case, in view of the conditions under which their business 381
was conducted, as to warrant the imposition of punitive damages. If you find there was, it is still in your discretion to say whether there should be an award of punitive damages or not. In that connection I will rehearse some observations which I read before from the opinion of the Court:

"The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items" would exonerate the defendant from being mulcted in punitive damages.

382 A Juror (No. 12): So far as compensatory damages are concerned, does the plaintiff have to prove actual damages?

The Court: Oh, no. In regard to compensatory damages the plaintiff is not bound to show any actual damage. It is to be presumed from the publication of a defamatory article that he has sustained some damage, and it is for the jury to say, in view of all the circumstances, how much, how much he has been injured in the estimation of those who know him; how much he has been injured in his own feelings.

A Juror: (No. 10.) I would like to ask a question. I understood in the course of your Honor's charge
383 that you made the remark that there was no evidence in this case showing any maliciousness.

The Court: No personal malice. What I mean to say is this: There is no evidence in this case which would warrant you to find that the managing editor or any of the employees of the defendant had any personal ill will towards this plaintiff, and, if there is any malice at all it is malice in that sense which is implied from recklessness and careless conduct.

Whereupon counsel for defendant did then and there duly except to so much of said charge as instructed the jury that they can under any circumstances find malice in this case on which punitive
384 damages can be inflicted, which exception was duly noted and allowed.

And the said Judge under the charge and with the direction aforesaid *inter alia* left the aforesaid issues and the evidence as given on the said trial to the said jury and the said jury then retired and subsequently rendered a verdict for the plaintiff in the sum of seven thousand dollars.

And inasmuch as the various exceptions taken during the course of the trial and the exceptions made to the decisions and rulings of the Court, as well as in respect to the charge and the refusals to charge as in all other matters, would not otherwise

appear upon the record, I have, on the prayer of the 385
said defendant, by its counsel, settled, allowed and signed the bill of exceptions, which contains in substance all the material evidence given in this case during the April Term of this Court in the year 1895, and it is

Ordered, that this bill of exceptions be filed *nunc pro tunc* as of the 28th day of May, 1894, as part of the record herein, with like force and effect as if the same had been reduced to writing, signed and filed before the case was given to the jury.

And I certify that after the case was so left to the jury, the said jury retired and subsequently rendered a verdict for the plaintiff in the sum of $7,000, and
that thereafter on the 28th day of May, 1895, the 386
counsel for the plaintiff made a motion to set aside the verdict and for a new trial on the exceptions, and because the verdict is contrary to the evidence and is for excessive damages, which motion the Court denied, to which ruling and decision of the Court the counsel for the defendant then and there duly excepted.

In witness whereof, I have hereunto set my hand at the City of New York on the 6th day of September, 1895.

Settled and allowed as aforesaid.

WM. J. WALLACE,
U. S. Circuit Judge.

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We hereby approve of the within bill of exceptions and consent that the same be signed and filed *nunc pro tunc* as of May 28, 1895, and it is hereby stipulated and agreed that the matter in said bill of exceptions purporting to be exhibits of the plaintiff and defendant in evidence at the trial are true copies of the original exhibits in evidence in this action.

Dated New York, August 31, 1895.

DEMING & WALRADT,
Plff's. Attys.

BOWERS & SANDS,
Attorneys for Defendant.

388 (Endorsed)—Circuit Court of the United States for the Southern District of New York.—Alexander McDonald, Plaintiff, against The Press Publishing Company, Defendant.—Bill of Exceptions. Bowers & Sands, Attys. for Defendant, 54 William Street, New York City.—U. S. Circuit Court.—Filed Sep. 17, 1895, *nunc pro tunc* as of May 28, 1895.—John A. Shields, Clerk.—

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389 At a Stated Term of the United States Circuit Court for the Southern District of New York in the Second Circuit, held at the Court Room of the said Court in the United States Post Office Building, in the City of New York, in and for the Southern District of New York, on the 26th day of July, 1895.

Present—Hon. WM. J. WALLACE, *Judge*.

ALEXANDER MCDONALD,
Plaintiff,

AGAINST

390 THE PRESS PUBLISHING COMPANY,
Defendant.

A motion for a new trial on the part of the defendant having been made herein upon the minutes upon all the exceptions, and because the verdict is for excessive damages, and contrary to the evidence and contrary to law;

Now, after hearing John M. Bowers, Esq., of counsel for the defendant in support of said motion,

and Horace E. Deming, Esq., of counsel for the plaintiff in opposition thereto, it is 391

Ordered, that the said motion be and the same is hereby denied.

WM. J. WALLACE.

We consent to the entry of the above order.

DEMING & WALRADT,
Attorneys for Plff.

BOWERS & SANDS,
Attorneys for Defendant.

(Endorsed)—U. S. Circuit Court.—Alexander McDonald, Plaintiff, against The Press Publishing Company, Defendant.—Order.—Bowers & Sands, Attorneys for Defendant, 54 William Street, New York.—U. S. Circuit Court.—Filed Jul. 26, 1895.—John A. Shields, Clerk. 392

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK,

For the Second Circuit.

ALEXANDER MCDONALD, Plaintiff, VERSUS THE PRESS PUBLISHING COMPANY, Defendant.	Bond for Damages and Costs. 393

KNOW ALL MEN BY THESE PRESENTS, that we, the Press Publishing Company, having an office and principal place of business in the Pulitzer Building in the City of New York, and the Lawyers' Surety Company of New York, having an office and principal place of business at Nos. 32, 34 and 36 Liberty street in said city, are held and firmly bound unto the above named Alexander McDonald in the sum

394 of eight thousand dollars ($8,000) to be paid to said Alexander McDonald, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 12th day of September, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, the above named, the Press Publishing Company, has prosecuted a writ of error in the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for
395 the Southern District of New York, in favor of the plaintiff above named, for damages and costs in the sum of seven thousand one hundred and eighty-eight $\frac{85}{100}$ ($7,188.85) dollars.

Now, therefore, the condition of this obligation is such, that if the above named, The Press Publishing company, shall prosecute said writ of error to effect, and answer all damages and costs, if they shall fail to make their said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE PRESS PUBLISHING COMPANY,
[SEAL.] By DUMONT CLARKE,
Vice-President.

396 Sealed and delivered and taken and acknowleged, this 12th day of September, 1895, before me.

H. G. HINTON,
as to L. S. Co.

THE LAWYERS' SURETY COMPANY OF NEW YORK,
[SEAL.] By JOEL B. ERHARDT,
President.

Attest:

JOEL RATHBONE,
Acting Secretary.

STATE OF NEW YORK, } ss.: 397
City and County of New York, }

On this 12th day of September, 1895, before me personally came Dumont Clarke, vice-president of the Press Publishing Company, with whom I am personally acquainted, who being by me duly sworn, says that he is the vice-president of the Press Publishing Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company, and that he signed said instrument as vice-president of said company by like authority.

J. J. BENNETT,
[SEAL.] Notary Public, Kings Co. 398
Certificate filed in New York Co.

State, City and County of New York. ss.:

On this 12th day of September, 1895, before me personally appeared Joel B. Erhardt, president of The Lawyers' Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the City of New York, that he is the president of The Lawyers' Surety Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company and that he signed said instrument as president of said company by like authority; and 399 the said Joel B. Erhardt further said that he is acquainted with Joel Rathbone, and knows him to be the acting secretary of said company; that the signature of said Joel Rathbone subscribed to the said instrument, is in the genuine handwriting of the said Joel Rathbone, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Joel B. Erhardt, president.

H. G. HINTON,
[SEAL.] Notary Public,
Kings Co., N. Y.,
Certificate filed in N. Y. Co.

400 At a stated meeting of the Board of Directors of The Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34 and 36 Liberty street, in said city, on the 10th day of May, 1893, on motion, it was unanimously

"Resolved, that in pursuance of Section eight "hundred and eleven of the Code of Civil Pro- "cedure, the president, vice-president, the acting "president or the second vice president be, and "either of them is, hereby authorized and empow- "ered to sign, execute and deliver any and all bonds "or undertakings for or on behalf of the company, "and to attach thereto the seal of the corporation, "the same to be attested by the secretary or the
401 "acting secretary."

City and County of New York, ss.:

I, JOEL RATHBONE, acting secretary of The Lawyers' Surety Company, having compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand, and the seal of the company at the City of New York, this 12th day of September, 1895.

JOEL RATHBONE,
402 [SEAL.] Acting Secretary.

(Endorsed)—U. S. Circuit Court.—For the Southern District of New York, For the Second Circuit. —Alexander McDonald, Plaintiff, *vs.* The Press Publishing Company, Defendant.—Bond.—Bowers & Sands, Plff. in Error's Attys., 54 William St., N. Y. City.—We consent to approval of within bond.—Deming & Walradt, Attys. for Plff. and Deft. in Error.—New York. Sept. 12, 1895.—Approved, Sept. 12, 1895, E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court.—Filed Sep. 12, 1895.—John A, Shields, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS 403

FOR THE SECOND CIRCUIT.

THE PRESS PUBLISHING COMPANY,
Plaintiff in Error,

VERSUS

ALEXANDER MCDONALD,
Defendant in Error.

Assignment of Errors.

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Afterwards, to wit, on this 12th day of October, 1895, before the Justices of the United States Circuit Court of Appeals, in the Second Circuit, at the United States Post Office and Court House Building in the City of New York, comes the said Press Publishing Company by Bowers & Sands, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

FIRST.—The Court erred in overruling the challenge to the favor submitted by defendant to Alonzo B. Jones, who was called as a juror, and in permitting said Alonzo B. Jones to be sworn as a juror, 405 the said Alonzo B. Jones having made the following statements on his examination:

ALONZO B. JONES, called as a juror, was examined by defendant's counsel as follows:

Q. What is your business? A. Architect.

Q. Do you know the plaintiff in this action, Mr. McDonald, or his counsel, Mr. Deming? A. I know Mr. Deming slightly.

Q. Have you any business relations with Mr. Deming? A. No, not at all.

406 Q. Has he ever done any business for you? A. No.

Q. Never has done any business in your office? A. No.

Q. Do you know any of these gentlemen whose names I have read as Standard Oil trustees? A. Yes, sir.

Q. Do you know Mr. Rockefeller? A. I know Mr. Rockefeller.

Q. Do you know Mr. Wardwell? A. No.

Q. Mr. Flagler? A. Yes.

Q. Mr. Archbold? A. No.

Q. Mr. Rogers? A. No.

Q. Mr. Pratt? A. One of them.

407 Q. Have you had any business with these gentlemen? A. None at all.

Q. Did you ever have any business with the Standard Oil Company? A. No.

Q. Do you read the *World?* A. Occasionally.

Q. Have you any feeling or prejudice against the *World?* A. No.

Q. Has there ever been any publication made in the *World* which produced any prejudice in your mind? A. Yes; a great many.

Q. More so than in other papers in this city? A. No; there are a great many publications in all the papers that I have objection to.

Q. Have these been on political, business or pri-
408 vate matters? A. Political, mostly.

Q. Have there ever been publications made in the *World* newspaper which have aroused a feeling in your mind that the paper was not conducted as a paper should be? A. Well, I don't know,

Q. If a feeling sufficiently strong has been created in your mind to make you feel in any degree prejudiced against the *World?* A. No, any more than any other paper.

Q. Is there a prejudice in your mind against all papers published in this city? A. No prejudice. There are certain articles published.

Q. I mean have you formed an opinion as to the

question of their publishing articles which they ought not to publish; do you think they do that? A. Yes. 409

Q. That you think generally of the press? A. Generally of the press, particularly libellous articles?

Q. You have rather formed the conclusion that the press in New York is in the habit of publishing libellous articles? A. Yes.

Q. Have you ever had any article published concerning you or your business? A. No.

Q Or that of a friend of yours which created a feeling? A. No.

Q. Or general conclusion? A. I have had friends; yes.

Q. Have any of your friends brought suit against the paper? A. No. 410

Q. There have been publications made about friends which have aroused these feelings? A. Yes.

Q. Have any such publications ever been made in the *World?* A. Not to my recollection.

Q. Under those circumstances do you feel that you could give a just and fair consideration to the defense that will be presented to you in this case by the *World* newspaper, published by the Press Publishing Company, as if the defendant was some gentleman whom you held in high esteem? A. I would give it as fair consideration as I would any newspaper on the question of libel.

Q. Is it a fact that any newspaper would not stand as well before you as an individual? A. No. 411

Q. That is a feeling that it would require some little effort for you to disabuse your mind of, is it not? A. Yes. If the evidence was such I could do so.

Q. The first impression would be against them? A. Yes.

Q. And the first impression would be against them on a charge of libel? A. Yes.

412 By the Court:

Q. I did not understand you to say that you had any personal feeling or prejudice of any kind against the *World* newspaper? A. No, sir.

Q. Or the company which publishes it? A. No, sir.

Q. You have a general impression that the newspapers of this city, and perhaps of the country at large, are not as careful as they should be? A. Yes, sir.

Q. In regard to their publications concerning the private transactions of individuals? A. Yes, sir.

Q. Is your feeling such that in any case against a newspaper you have doubt whether you would be
413 able to render an impartial verdict? A. None at all.

Q. You have no doubt of your ability to consider the case against the *World?* A. None at all.

Q. Or the corporation which publishes it—upon its merits, and give it the benefit of the rules of law and the evidence? A. If the evidence was in their favor I would give it in their favor.

The Court: I overrule the challenge.

By Defendant's Counsel: May I ask one more question which has arisen from some that your Honor asked?

The Court: Yes.

414 By Defendant's Counsel:

Q. If the case involved the precise point suggested by his Honor as to whether or not the defendant had exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror? A. I think it would.

By Defendant's Counsel: I again submit my challenge to the favor, because that is the question in the case.

By the Court: 415

Q. Do you mean to say that you would assume that the newspaper had not exercised due care, irrespective of the character of the article or the circumstances of the case? A. No, I do not.

By Defendant's Counsel:

Q. Will you tell us precisely what you do mean?

The Court: I think he has been catechized sufficiently.

By Defendant's Counsel: Your Honor overrules my challenge, I understood you to say?

The Court: Yes.

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SECOND.—The Court erred in refusing defendant's request that the twelfth juror be excused and in overruling defendant's challenge to said juror.

THIRD.—The Court erred in admitting the following testimony of Alexander McDonald on direct examination, to wit:

"Will you tell us, in 1892, at the time this publication was made, in what institution and concern you were interested as director, president or otherwise?" To which the witness answered as follows: "I was president of the Standard Oil Company of Kentucky; of the Consolidated Coal and Mining Company, which is a mining corporation of Ohio; I was president of the Commercial Club of Cincinnati, a business organization composed of fifty of the leading citizens of the city; I was vice-president of the Cincinnati Museum and Art Association; I was a member of the College of Music of Cincinnati —one of the Board of Trustees; I was a trustee and elder in the Second Presbyterian Church of Cincinnati, one of the most influential churches of our denomination in the State; I was director in the Cincinnati, St. Louis and Chicago Railroad, known as the Big Four; also in the road known as the Cincin-

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418 nati Southern, a road leading from Cincinnati to New Orleans; and of the Queen City Club, which is the social club of Cincinnati; and several other small institutions."

FOURTH.—The Court erred in admitting the following testimony of Alexander McDonald on direct examination, to wit:

"When was your attention first called to that article?" To which the witness answered as follows: "Very soon after its publication; I don't know just how many days."

FIFTH.—The Court erred in admitting the follow-
419 ing testimony of Alexander McDonald on direct-examination, to wit: "In what way was it called to your attention?" To which the witness answered as follows: "It was first called to my attention by a gentleman on the street, in Cincinnati."

SIXTH.—The Court erred in admitting in evidence the three copies of the *World* newspaper marked Exhibits A, B and C.

SEVENTH.—The Court erred in admitting the following testimony of Levi C. Weir, on direct-examination, to wit: "Can you tell me what was his business and social standing is, or was in August, 1892?" To which the witness answered as follows:
420 "It was of the highest."

EIGHTH.—The Court erred in refusing to allow the witness Solomon S. Carvalho, on redirect examination, to answer the following question, to wit: "Can you state what is the custom in the newspaper offices in this city as to having dispatches repeated?"

NINTH.—The Court erred in refusing to allow the witness Solomon S. Carvalho, to answer the following question, on redirect-examination, to wit: "Can

you tell me whether prior to August, 1892, there had ever occurred in the *World* office so serious an alteration or change in a dispatch as to change the name of the individual concerning whom it was sent or to change the entire substance of the dispatch?" 421

TENTH.—The Court erred in admitting the following testimony of Milton Gosdorfer on cross-examination, to wit: "How did you know who he was?" to which the witness answered as follows: "I knew it from the matter that arose at this time about his having gone away."

ELEVENTH.—The Court erred in admitting the following testimony of Milton Gosdorfer on cross-examination, to wit: "Then you got your facts from another newspaper?" to which the witness answered as follows: "Yes." 422

TWELFTH.—The Court erred in admitting the following testimony of Milton Gosdorfer on cross-examination, to wit: "Did you know at the time that you sent that dispatch that this Mr. Evan Smith had a family?" to which the witness answered as follows: "I don't recall exactly. I don't think I did know."

THIRTEENTH.—The Court erred in admitting the following testimony of Alexander McDonald, on direct-examination, to wit: 423

"What was Mr. Evan Smith's business, if you know?" to which the witness answered as follows: "He was one of the traveling auditors of the Standard Oil Company of Kentucky."

FOURTEENTH.—The Court erred in admitting the following testimony of Alexander McDonald on direct-examination, to wit: "Here is the dispatch claimed to have been sent from Cincinnati: "Evan Smith, who was confidential

424 man for his brother-in-law, Alexander McDonald, the millionaire Southern Ohio manager of the Standard Oil Company, until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, a town near Windsor, Canada. McDonald claims that Smith's accounts are straight, but that he is insane, and will be brought to a sanitarium here." The dispatch is dated in Cincinnati, August 17th, 1892. I now ask you whether Mr. Evan Smith strangely disappeared six months before this dispatch was dated? To which the witness answered as follows: "No, sir."

FIFTEENTH.—The Court erred in admitting the
425 following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct examination: "I reside in Cincinnati, Ohio. I know Mr. Evan Smith. I have known him about seven years. St. Catherines is about seventy-five miles from Niagara Falls, on the Canada side. I went to St. Catherines and found Mr. Smith and brought him home. I found him in the hotel in St. Catherines."

SIXTEENTH.—The Court erred in admitting the following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct-examination as follows, to wit: "Had Mr. Smith
426 disappeared six months prior to the time you met him in Canada?" To which the witness answered as follows: "He had not."

SEVENTEENTH.—The Court erred in admitting the following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct examination as follows, to wit: "Was there anything strange about his appearance here? Did he not leave here simply on an ordinary summer excursion with his family for the purpose of getting rest?" To which the witness answered as follows: "That is the way we all understood it."

EIGHTEENTH.—The Court erred in admitting the following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct examination, as follows, to wit: "There was nothing secret about his leaving?" To which the witness answered as follows: "No." 427

NINETEENTH.—The Court erred in admitting the following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct-examination, as follows, to wit: "When you found him was he living in luxury?" To which the witness answered as follows: "He was living in a small hotel; hardly luxurious; just a country hotel." 428

TWENTIETH.—The Court erred in admitting the following testimony read by counsel for the plaintiff from the deposition of F. E. Powell on direct-examination as follows, to wit: "When did Mrs. Smith return to Cincinnati?" to which the witness answered as follows: "With her husband."

TWENTY FIRST.—The Court erred in admitting the following testimony, read by counsel for the plaintiff from the deposition of F. E. Powell on direct-examination as follows, to wit: "When was that?" To which the witness answered as follows: "About August 17th, I guess; I think we came back the night the article came out in the *Post*." 429

TWENTY-SECOND.—The Court erred in admitting the following testimony of Alfred S. Brown on direct-examination as follows, to wit: "Assuming the original dispatch to have been worded as it is said to have been, and to have been delivered here as it is said to have been, I ask you if in the usual course of telegraph business such a discrepancy could have occurred?" To which the witness answered as follows: "No, such a discrepancy could not have occurred in the usual course of telegraph business. It

430 is a discrepancy that is not to be attributed to an error of transmission, in my judgment."

TWENTY-THIRD.—The Court erred in denying defendant's motion at the close of the plaintiff's case that the Court instruct the jury to render a verdict in favor of the defendant on the following grounds:

First.—That the article complained of does not contain any language that is libellous *per se;* that the language is plain and that it is the duty of the Court to determine its meaning, and that there is nothing in it of a character to justify its being left to the jury.

431 *Second.*—On the further ground that the plaintiff cannot by innuendo add to the plain meaning of language and cannot put a construction upon the language which is not its natural import.

Third.—Upon the further ground that the plaintiff in this case charges as his innuendo in substance that the effect of the article was to charge the plaintiff with embezzlement, or a crime of that nature, whereas by the laws and treaties of the United States, and especially the treaties of the United States with Great Britain, a person who was guilty of the crime of embezzlement was extraditable at the time of this publication, and had been for at
432 least two years prior thereto, from any part of Great Britain, including Canada, and therefore any construction that could be claimed to be put upon it that Canada was a haven for persons who had been embezzlers, or criminals of that nature, could not be put upon it in view of that statute at the time of this publication.

Fourth.—Also on the ground that there is no evidence in the case of express malice on the part of the defendant:

The Court decided as follows: "I don't care to hear any questions of law discussed. I don't think

I can be enlightened by them. You will have a 433
chance to discuss those in an appellate Court if it becomes necessary. I shall deny your motion. I shall rule that under the language of this publication it becomes a question for the jury to determine whether it was libellous in the sense that it was calculated to bring the plaintiff into disgrace and discredit. And as to the question of malice, if they find the article was libellous and untrue, the law implies malice. Although there was no actual malice on the part of anybody connected with the *World* newspaper, that cannot affect the plaintiff's right to recover compensation."

TWENTY-FOURTH.—The Court erred in ruling: 434
"That under the language of this publication, it becomes a question for the jury to determine whether it was libellous in the sense that it was calculated to bring the plaintiff into disrepute and discredit, and that as to the question of malice, if they find the article was libellous and untrue, the law implies malice, and that although there was no actual malice on the part of anybodyconnected with the *World* newspaper, that cannot affect the plaintiff's right to recover compensation."

TWENTY-FIFTH.—The Court erred in charging the jury as follows, to wit:

435

"Every publisher is therefore liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feeling as must unavoidably be inferred from such a libel, published in a paper of such a position and circulation."

"Well, gentlemen, in actions for libel, not only are the parties injured entitled to compensatory damages, but under certain circumstances it is the duty of the jury to award exemplary or punitive damages against the defendant, and it may become a question of considerable importance to you in your delibera-

436 tions in this case, whether upon the facts which have been introduced in evidence this is a case in which damages should be rendered against this defendant which the law terms punitive damages, damages by way of example, damages which are given for the purpose of deterring others from committing like offenses against the peace and reputation of others.

"The question whether any punitory damages are to be given depends upon your conclusion whether this publication was made with recklessness and with a wanton disregard of the question of its truth or falsity. Upon this question the plaintiff takes the burden of proof. If you find in the affirmative, you are not compelled but are permitted to give such
437 reasonable and just damages as you think it wise to give in order to deter like conduct in the future. The amount of vindictive damages is within your discretion, but it is my duty to caution you against excessiveness; you are to be reasonable and just. This question of punitory damages or no punitory damages is practically the most important one in the case."

"Now, in the event that you find the article to have been libellous, the plaintiff is entitled to compensatory damages; that is, such damages as will recompense him for injury to his reputation and for injury to his feelings. If, in addition to that, you find, applying the rules of law as they have been de-
438 livered to you, that the case is one where the publication was made under circumstances of such recklessness and wantonness as to be equivalent to malice, then you are at liberty to award a verdict of exemplary damages."

TWENTY-SIXTH.—The Court erred in charging the jury: "That the plaintiff is entitled to recover, if entitled to recover at all, such damages as would compensate him for injury to his reputation, taking into consideration his position and that of the defendant."

TWENTY-SEVENTH.—The Court erred in charging 439
the jury as follows:

"He is certainly entitled to recover damages, and the question is how much. Damages in actions for defamation are awarded for injury to reputation, and the extent of the injury is determined largely by the character and position of the plaintiff, and somewhat also by the publicity, the extent of circulation, given to the defamation."

TWENTY-EIGHTH.—The Court erred in refusing defendant's request to charge as follows:

"That the language used in the article which is complained of as libellous in the complaint in this 440
action is not libellous *per se*."

TWENTY-NINTH.—The Court erred in refusing defendant's request to charge as follows:

"That the article complained of in the complaint is not libellous *per se*."

THIRTIETH.—The Court erred in refusing defendant's request to charge as follows:

"That the words used in the article complained of in the complaint are not ambiguous, and it is the duty of the Court, as matter of law, to determine that the same are not actionable."
441

THIRTY-FIRST.—The Court erred in refusing defendant's request to charge as follows:

"That the publication complained of as a whole does not permit an interpretation defamatory to the plaintiff."

THIRTY-SECOND.—The Court erred in refusing defendant's request to charge as follows:

"That Canada is not a haven of refuge for criminals, and is not a shelter for offenders against the laws of the United States."

442 THIRTY-THIRD.—The Court erred in refusing defendant's request to charge as follows:

"That, by the terms of the treaty existing between the Government of the United States and the Government of Great Britain, all persons guilty of embezzlement, receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained, are subject to extradition, as are also all persons guilty of fraud by a bailee, banker, agent, factor, trustee or director, or member or officer of any company made criminal by the laws of both countries."

THIRTY-FOURTH.—The Court erred in refusing de-
443 fendant's request to charge as follows:

"That such treaty was in full effect and operation at the time of the publication complained of in the complaint, and had been in full effect and operation for two years prior thereto."

THIRTY-FIFTH.—The Court erred in refusing defendant's request to charge as follows:

"That the plaintiff in this action by way of innuendo, charges that the defendant by the publication complained of accused him of the crime of embezzlement or of being accessory thereto, and to have it understood and believed that he was guilty of a great and infamous crime, and meaning and in-
444 tending to accuse the plaintiff of odious and disgraceful conduct, and meaning and intending to charge that the plaintiff had been obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains. That plaintiff having selected the foregoing as his innuendo, cannot go to the jury on any other claim."

THIRTY-SIXTH.—The Court erred in refusing defendant's request to charge as follows:

"That unless the jury find that the fair meaning of the article was to convey the impression that the

plaintiff had been guilty of embezzlement or of being accessory thereto, or that the fair meaning of such article was to accuse the plaintiff of and to have it understood and believed that he was guilty of a great and infamous crime, or that the fair meaning of the article was to accuse the plaintiff of odious and disgraceful conduct and thereby to injure and destroy his character and bring him into disrepute and disgrace, or that the fair meaning of the article was that the plaintiff, for some or all of the reasons aforesaid, had been obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains, their verdict must be for the defendant." 445

446

THIRTY-SEVENTH.—The Court erred in refusing defendant's request to charge as follows:

"That the jury cannot give a verdict for the plaintiff merely because they shall consider that the fair meaning of the article was to impute to the plaintiff some other crime or some other defamatory act."

THIRTY-EIGHTH.—The Court erred in refusing defendant's request to charge as follows:

"That the burden of proof is upon the plaintiff in this action, and he must satisfy the jury by a fair preponderance of proof on all the issues that must be maintained by him in the action."

447

THIRTY-NINTH.—The Court erred in refusing defendant's request to charge as follows:

"That the gist of the action of libel is malice."

FORTIETH.—the Court erred in refusing defendant's request to charge as follows:

"That unless the jury find that the defendant was guilty of malice, there can be no recovery in this action."

448 FORTY-FIRST.—The Court erred in refusing defendant's request to charge as follows:

"That there is no evidence in this case justifying a finding of express malice."

FORTY-SECOND.—The Court erred in refusing defendant's request to charge as follows:

"That there is no evidence in this case that the defendant was influenced by actual or express malice toward the plaintiff in making the publication complained of."

FORTY-THIRD.—The Court erred in refusing de-
449 fendant's request to charge as follows:

"That express malice is when one with a deliberate mind and formed design commits the acts complained of."

FORTY-FOURTH.—The Court erred in refusing defendant's request to charge as follows:

"That there is no evidence in this case justifying a finding that the defendant was so grossly and recklessly negligent or wantonly indifferent to the rights of the plaintiff as to permit a finding of express malice therefrom."

450 FORTY-FIFTH.—The Court erred in refusing defendant's request to charge as follows:

"That it is not gross negligence for a person receiving a telegram to act upon its contents."

FORTY-SIXTH.—The Court erred in refusing defendant's request to charge as follows:

"That it is not gross negligence for one receiving a telegram to act upon its contents without causing the same to be repeated."

FORTY-SEVENTH.—The Court erred in refusing defendant's request to charge as follows: 451

"That in determining this question the jury is bound to take into consideration the necessities of the business of the defendant, and to consider the enormous amount of matter received every day, and the evidence tending to show that it would be impossible to repeat the telegrams received in time to give the same to the public in accordance with the usual course and custom of the defendant's business."

FORTY-EIGHTH.—The Court erred in refusing defendant's request to charge as follows:

"That in determining this question, the jury are 452
bound to take into consideration all evidence tending to show the general accuracy and safety of the business conducted by the defendant in reliance upon telegrams received from its correspondents all over the world, and the few instances in which errors occur."

FORTY-NINTH.—The Court erred in refusing defendant's request to charge as follows:

"That if the jury find that the defendant for years has been in the habit of conducting its business so far as the publication of telegrams from other localities are concerned in the way of news, in
the manner set forth by the defendant's witnesses in 453
this action, and there is no evidence to show that on any other occasion any errors have occurred prejudicial to any person whomsoever, that then the jury are bound to find that it has not conducted its business in a reckless manner, or has been wantonly indifferent to the rights of the plaintiff."

FIFTIETH.—The Court erred in refusing defendant's request to charge as follows:

"That the jury are bound to take into consideration the enormous amount of business done by the

454 defendant, and the enormous amount of telegrams received each night and the propriety of giving the same to the public the following morning."

FIFTY FIRST.—The Court erred in refusing defendant's request to charge as follows:

"That the collecting of news and the publishing of the same is a lawful business, and the defendant is not bound in order to avoid the charge of wanton recklessnsss or gross negligence, to adopt such course as will insure in every instance the accuracy of the dispatch received."

FIFTY-SECOND.—The Court erred in refusing de-
455 fendant's request to charge as follows:

"That all that the defendant is bound to do is to exercise such ordinary diligence in the management of the particular business carried on by it, as an ordinary wise and prudent man would exercise in a similar case."

FIFTY-THIRD.—The Court erred in refusing defendant's request to charge as follows:

"That if the jury shall find that the defendant pursued such course, then in the absence of proof that on some prior occasion errors have arisen to the damage of some person, then the jury are bound
456 to find that there was no such reckless indifference or wanton negligence as to justify a finding of express malice."

FIFTY-FOURTH.—The Court erred in refusing defendant's request to charge as follows:

"That vindictive damages are given by way of punishment and by way of punishment alone."

FIFTY-FIFTH.—The Court erred in refusing defendant's request to charge as follows:

"That such punishment should not be inflicted upon a defendant who exercises such ordinary care

as the exigencies and nature of its business demand, 457
and as would be exercised in the conducting of the same business by an average man of ordinary prudence."

FIFTY-SIXTH.—The Court erred in refusing defendant's request to charge as follows:

"That there is no evidence in this case to show that the defendant had any knowledge of or animosity against the plaintiff, and, therefore, there is no direct evidence from which the jury can find that the alleged libel was published for the purpose of injuring him."

FIFTY-SEVENTH.—The Court erred in refusing de- 458
fendant's request to charge as follows:

"That even if it be the law that express malice may be shown by reckless and wanton carelessness or wanton neglect to ascertain the truth of a publication, yet such rule has no application to this case."

FIFTY-EIGHTH.—The Court erred in refusing defendant's request to charge as follows:

"That even if it be the law that express malice may be shown by reckless and wanton carelessness, such express malice can only be found where the plaintiff has shown by a substantial preponderance 459
of proof that such reckless and wanton carelessness in fact exists."

FIFTY-NINTH.—The Court erred in refusing defendant's request to charge as follows:

"That even if it be the law that express malice may be shown by reckless and wanton carelessness, such a finding of reckless and wanton carelessness cannot be predicated upon mere assumption, but must be founded upon evidence."

460 SIXTIETH.—The Court erred in refusing defendant's request to charge as follows:

"That in this case there is no proof to sustain such a finding."

SIXTY-FIRST.—The Court erred in refusing defendant's request to charge as follows:

"That in this case the evidence shows that the defendant employed a correspondent in whom it had confidence, in Cincinnati, and who sent it news for which he was to be paid if the same was used."

SIXTY-SECOND.—The Court erred in refusing de-
461 fendant's request to charge as follows:

"That the defendant had employed the Postal Telegraph Company, a corporation doing a telegraph business in the United States, to transmit such dispatches from its correspondent in Cincinnati to New York, and that such evidence of precautions cannot be overcome or thrown aside by the mere proof of failure on the part of the defendant to make other or further inquiries concerning the correctness of the dispatches it received."

SIXTY-THIRD.—The Court erred in refusing defendant's request to charge as follows:

462 "That to authorize a finding of reckless and wanton carelessness, plaintiff is bound to make out a case of justifying such finding and must establish by a preponderance of evidence such fact to the satisfaction of the jury."

SIXTY-FOURTH.—The Court erred in refusing defendant's request to charge as follows:

"That even if it be the law that express malice may be shown by reckless or wanton carelessness on the part of the defendant, in order to justify the infliction of punitory damages, plaintiff is bound to establish by a fair preponderance of evidence facts

which establish reckless and wanton carelessness on 463
the part of the defendant concerning the publication of the article in question."

SIXTY-FIFTH.—The Court erred in refusing defendant's request to charge as follows:

"That the defendant is not liable in punitory or exemplary damages for mistakes made by its servants or agents unless such servants or agents are shown to be incompetent or to have made similar mistakes on previous occasions which have come to the knowledge of the defendant."

SIXTY-SIXTH.—The Court erred in refusing de- 464
fendant's request to charge as follows:

"That all men are equal before the law."

SIXTY-SEVENTH.—The Court erred in refusing defendant's request to charge as follows:

"That in an action seeking to recover damages for the publication of an alleged libel, all plaintiffs of the same moral character and reputation, stand upon an equal footing, and the fact that the plaintiff in this action may hold a high social position, does not justify a larger verdict in his favor than would be given to any other person of equally good moral character."

SIXTY-EIGHTH.—The Court erred in refusing de- 465
fendant's request to charge as follows:

"That the fact that the plaintiff is a member or officer of various clubs and social institutions is not to be considered by the jury in determining the question of damages."

SIXTY-NINTH.—The Court erred in refusing defendant's request to charge as follows:

"That the defendant is not liable for the wrongful negligence or malicious acts of its agents, unless it has directed or ratified such acts."

466 SEVENTIETH.—The Court erred in refusing defendant's request to charge as follows:

"That the defendant is not liable for mistakes made by its servants or agents, unless such servants or agents are shown to be incompetent or to have made similar mistakes on previous occasions which have come to the knowledge of the defendant."

SEVENTY-FIRST.—The Court erred in refusing defendant's request to charge as follows:

"That there is no proof on which special damages may be given in this action."

467 SEVENTY-SECOND.—The Court erred in refusing defendant's request to charge as follows:

"That the question as to whether this dispatch relating to Mr. Evan Smith sent from Cincinnati, was correct or not, is not involved in this action."

SEVENTY-THIRD.—The Court erred in refusing defendant's request to charge as follows:

"That if the jury find that the dispatch was made to refer to Alexander McDonald, the plaintiff, instead of to Evan Smith, by reason of accident or mistake on the part of the Postal Telegraph Company, then they cannot award exemplary or punitory damages in this action."

468 SEVENTY-FOURTH.—The Court erred in charging the jury as follows:

"There is no evidence in this case which would warrant you to find that the managing editor or any of the employees of the defendant had any personal ill-will towards this plaintiff, and if there is any malice at all it is malice in that sense which is implied from reckless and careless conduct.

Now, it is for you to say, upon the facts in this case, whether there was that recklessness of con-

duct on the part of the defendant in this case, in 469
view of the conditions under which their business was conducted, as to warrant the imposition of punitive damages. If you find there was, it is still in your discretion to say whether there should be an award of punitive damages or not."

SEVENTY-FIFTH.—The Court erred in denying the defendant's motion for a new trial made at the same term, upon the Judge's minutes to set aside the verdict and grant a new trial upon the exceptions.

SEVENTY-SIXTH.—The Court erred in denying the defendant's motion made at the same term upon the 470
Judge's minutes to set aside the verdict and grant a new trial, because the verdict was for excessive damages.

SEVENTY-SEVENTH.—The Court erred in denying the defendant's motion made at the same term upon the Judge's minutes to set aside the verdict and grant a new trial because the verdict was contrary to the evidence and contrary to law.

And the said plaintiff in error, The Press Publishing Company, prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things 471
which it has lost by reason of the said judgment.

BOWERS & SANDS,
Attorneys for Plaintiff in Error.

(Endorsed)—United States Circuit Court of Appeals, for the Second Circuit.—The Press Publishing Company, Plaintiff, against Alexander McDonald, Defendant.—Assignment of Errors.—Bowers & Sands, Attorneys for Plaintiff in Error, 54 William Street, New York.—U. S. Circuit Court.—Filed Sep. 12, 1895.—John A. Shields, Clerk.

472 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

TO ALEXANDER MCDONALD, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the City of New York on the 12th day of October, eighteen hundred and ninety-five, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein The Press Publishing Company is plaintiff in error, and you are defendant in error, to show cause, if there be, why the judgment in the
473 said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated New York, September 12, 1895.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed)—United States Circuit Court of Appeals, Southern District of New York.--The Press Publishing Company, Plaintiff in Error, against Alexander McDonald, Defendant in Error.—Citation.—Bowers & Sands, Attorneys for Plaintiff in Error, 54 William Street, New York.—Take notice that the within is a copy of a citation duly filed this day in the within en-
474 titled action, in the office of the Clerk of the U. S. Circuit Court for the Southern District of New York.—Dated Sep. 16, 1895.—Bowers & Sands, Attorneys for Plff. in Error, 54 William St., N. Y. City.—To Deming & Walradt, Esqs., Attorneys for Deft. in Error.—Service of the within is admitted this 16th day of September, 1895.—Deming & Walradt, Attorneys for Deft. in Error.—U. S. Circuit Court.—Filed Sept. 16, 1895.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS 475

FOR THE SECOND DISTRICT.

THE PRESS PUBLISHING COMPANY

vs.

ALEXANDER MCDONALD.

This writ of error was brought by the defendant in the Circuit Court to review the alleged errors of the Circuit 476
Judge upon the second trial to the jury of an action pending in the U. S. Circuit Court for the Southern District of New York, for an alleged libel which was published in the New York *World*.

SHIPMAN, *C. J.*:

The facts with respect to the alleged libel which is the subject of this suit, the publication itself, its actionable character, the law in regard to evidence of the plaintiff's social standing, and in regard to the subjects of express malice and punitory damages, were fully considered upon the first writ of error and are stated in the opinion of this Court (63 Fed. Rep., 238). 477

The questions which arise upon the present writ of error, which are both new and important, are the alleged errors in overruling a challenge to the favor and in admitting the challenged person to become a juror, and in the admission of evidence in regard to the falsity of Gosdorfer's original dispatch.

Alonzo B. Jones, an architect, and apparently an intelligent and cautious person, who was called as a juror, was examined by the counsel for the defendant and by the Judge. In reply to the defendant's counsel he said,

478 among other things, that he had no feeling or prejudice against the *World* and no prejudice against the newspapers of the City of New York; that he thought the papers of the city published articles which they ought not to publish; that no publication in the *World* against any of his friends had been made; that the first impression would be against newspapers on a charge of libel, and that it was a feeling that would require some little effort for him to free himself from. To the Judge he said that he had no doubt at all in regard to his ability to render an impartial verdict in any case against a newspaper, or of his ability to be impartial in a case against the *World;*
479 that he would give the defendant corporation the benefit of the rules of law and of the evidence which was in its favor. The defendant's counsel then asked the following question:

"If the case involved the precise point suggested by his Honor as to whether or not the defendant had exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror?" to which the witness replied, "I think it would." To the question of the Judge, "Do you mean to say that you would assume that the newspaper had not exercised due care, irrespective of the character of the article, or the circumstances of the
480 case," he replied, "No; I do not."

Challenges in the Federal Courts to the favor are tried by the Court (Rev. Stats., Sect. 819), and an alleged error in the decision which is duly excepted to is the subject of review by the Appellate Court. But it must be remembered that the question before the trial Judge, although one of mixed law and fact, is, in the main, a question of fact, and that while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness and

evenness of mind, from a personal inspection of him, and 481
the belief in regard to his probable character, which is created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable and have deserved weight before an appellate Court, and therefore the finding of fact by the trial Court will not be set aside except for manifest error. Thus Chief Justice Waite in Reynolds *vs.* U. S. (98 U. S., 145), says in regard to the finding upon a challenge for cause in a criminal case, the alleged cause being a preconceived opinion, as follows: "It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the Court will practi- 482
cally be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial Court upon that issue ought not be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the Court ought to have found the juror had 483
formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the Court."

The tendency of the modern decisions by the New York Court of Appeals is also to regard the question arising under a challenge to the favor as one of fact in the majority of cases, and dependent upon the circumstances of the particular case, and, therefore, to give proper weight to the opinion of the trial Judge who had an opportunity to

484 see the juror. (Thomas *vs.* People, 67 N. Y., 218; Young *vs.* Johnson, 123 N. Y., 226.)

In this case, if the answer of Jones to the last question which was put by the defendant's counsel, was the only or was the main answer in the examination, the challenge should have been sustained. He had said abundantly that he had no feeling or prejudice against the *World*, but that his first impression would be against newspapers who were charged with libel. In reply to the Court, and to a certain extent also from his previous answers, it became apparent that this impression was a general one, that newspapers were not as careful as they should be in regard to their publications concerning the private transactions
485 of individuals, but he had no doubt that he could render an impartial verdict in a case against the *World* or any other newspaper, and would give to the defendant the benefit of the evidence in its favor. At this point the Court overruled the challenge. The counsel then put the question and answer which has already been quoted, and in reply to the Court's question the witness said that there would be no assumption on his part that the newspaper had not exercised due care. The Court again overruled the challenge, evidently upon the ground that the entire examination showed that while there was an impression that newspapers, as a class, were not as careful as they ought to be
486 in publications of a personal character, yet that the man not only intended to be impartial, but was actually so, and that his impression or "feeling" was not of that substantial character which would interfere with and put his judgment or faculty for judging truly, out of equipoise. When the juror was asked about this vague impression or feeling, his answers gave it undue importance. When he investigated his own impartiality, he had no doubt of himself, and in that conclusion the trial Judge, who saw and endeavored to scrutinize and weigh the juror, coincided. We concur in his conclusion that the impressions were of

the character "which may fairly be presumed to yield to 487
the testimony that may be offered, which may leave the mind open to a fair consideration of it," and which Chief Justice Marshall thought constituted no sufficient objection to a juror (1 Burr's Trial, 416).

The defendant urges Jones' prejudice against newspapers, as an objection to his competency, upon the ground that a juror who has a prejudice against lawful business is incompetent. Assuming that the proposition is true, Jones' impression in regard to the methods of conducting newspapers, was not of that character which could be considered a disqualifying prejudice.

The next exception relates to the admission of testimony 488
in regard to the falsity of Gosdorfer's original despatch. The case really turned upon the question of damages, the effort of the defendant being to reduce them to a nominal sum, and to that end to show that there was no wantonness or carelessness, but that it exercised a high degree of care in the selection of correspondents and in the reliance upon them for truthful despatches. It offered Gosdorfer as a witness, who proved that he wrote and sent the original despatch, and also offered the despatch itself. Upon the cross-examination of Gosdorfer, the plaintiff endeavored to show that he had, without investigation, incorrectly changed the language of the statement which he originally saw in regard to Evan Smith, and offered further evi- 489
dence to show the untruthfulness of the despatch as sent, and that investigation would have shown its incorrectness.

This testimony was admissible for the purpose for which it was offered, to attempt to refute the theory of the defendant of adequate care in the collection and publication of news, by an examination of the truthfulness of the despatch which the defendant had put in evidence as the origin of the published despatch.

The general subject of testimony in regard to the social status of a libelled plaintiff, was so fully examined in the

490 former opinion that the discussion needs no repetition. The amount of testimony of that character, upon this trial, was kept within proper bounds by the trial Judge. After the plaintiff had stated the character and extent of the social and business positions which he occupied, a single witness replied most briefly to a very general inquiry in regard to the plaintiff's business and social standing.

The judgment of the Circuit Court is affirmed, with costs.

JOHN M. BOWERS, for the plaintiff in error.

HORACE E. DEMING, for the defendant in error.

491 [Endorsed]: United States Circuit Court of Appeals for the Second Circuit. The Press Publishing Company *vs.* Alexander McDonald. Opinion, Shipman, C. J. United States Circuit Court of Appeals, Second Circuit, filed April 7, 1896. James C. Reed, Clerk.

492

At a Stated Term of the United Stated Circuit Court of Appeals for the Second Circuit, held at the Post Office Building in the City of New York on the 7th day of April, 1896. 493

Present—Hon. NATHANIEL SHIPMAN,
Hon. E. HENRY LACOMBE,
Circuit Judges.

PRESS PUBLISHING COMPANY,
Plaintiff in Error,

against 494

ALEXANDER MCDONALD,
Defendant in Error.

The appeal in this cause having been regularly brought on for a hearing upon the writ of error issued out of this Court to the Circuit Court of the United States for the Southern District of New York, dated the 12th day of September, 1895, to reverse the judgment in that Court in an action wherein Alexander McDonald, the defendant in error, was plaintiff, and the Press Publishing Company 495 the plaintiff in error was defendant, which judgment was duly filed and entered in the office of the Clerk of that Court on the 12th day of September, 1895, in favor of the plaintiff, Alexander McDonald, and against the defendant, the Press Publishing Company, for the sum of seven thousand one hundred and eighty-eight 85/100 ($7,188.85) dollars, damages and costs. Now, after hearing John M. Bowers, Esq., of counsel for plaintiff in error, in support of said writ, and Horace E. Deming, Esq., of counsel for

496 defendant in error, in opposition thereto, and due deliberation having been had, it is

Ordered, that said judgment be, and the same hereby is, in all things affirmed, with costs to the defendant, and and that a proper mandate be issued to the Court below in accordance herewith.

E. H. L.
N. S.

We have no objection to the form of above order.

BOWERS & SANDS,
Attorneys for Plaintiff in Error.

497 GENTLEMEN:

You will please take notice that we shall present the foregoing proposed order to the Judges of the Circuit Court of Appeals, at the Post Office Building, in the City of New York, on the 27th day of April, 1896, at 10.30 A.M., on that day for settlement.

Dated New York, April 9th, 1896.

Yours, etc.,
DEMING & WALDRADT,
Attorneys for Defendant in Error,
11 William Street,
N. Y. City.

498

(Endorsed): "U. S. Circuit Court of Appeals—Press Publishing Company against Alexander McDonald—Order and Notice of Settlement.—Deming & Waldradt, Attorneys for Defendant in Error, 11 William Street, New York.—Due and timely service of a copy of the within order and notice of settlement on the 15th day of April, 1896, is hereby admitted. Bowers & Sands, Attorneys for Defendants. United States Circuit Court of Appeals, Second Circuit, filed April 20, 1896, James C. Reed, Clerk."

UNITED STATES OF AMERICA, Southern District of New York, } ss.: 499

I, JAMES C. REED, Clerk of the United States Circuit Court of Appeals for the Second Circuit,

DO HEREBY CERTIFY, that the foregoing pages, numbered from 1 to 168, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The Press Publishing Company, Plaintiff in Error, against Alexander McDonald, Defendant in Error, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the 500 City of New York, in the Southern District of New York, in the Second Circuit, this eigthth day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States, the one hundred and twentieth.

JAMES C. REED,
Clerk.

501